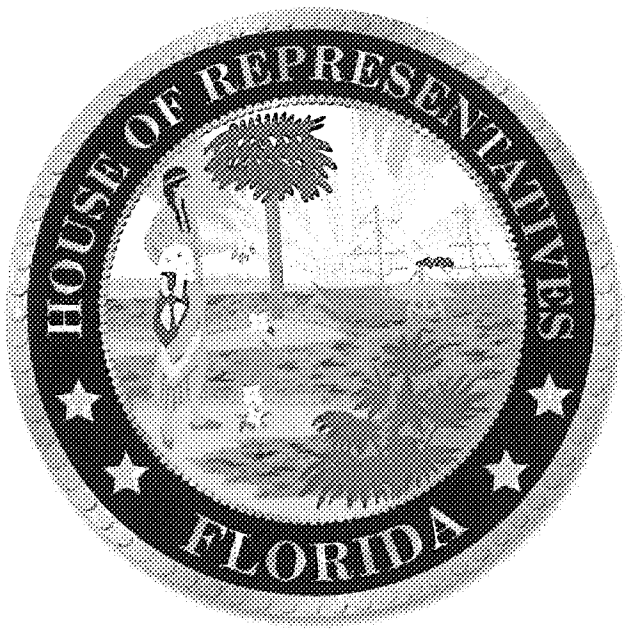

JUDICIARY COMMITTEE

MEETING PACKET

Tuesday, March 28, 2006
10:15 a.m. – 12:00 p.m.
Morris Hall
(17 HOB)

Allan G. Bense
Speaker

David Simmons
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Judiciary Committee

Start Date and Time:	Tuesday, March 28, 2006 10:15 am
End Date and Time:	Tuesday, March 28, 2006 12:00 pm
Location:	Morris Hall (17 HOB)
Duration:	1.75 hrs

Consideration of the following bill(s):

HB 129 Lawful Ownership, Possession, and Use of Firearms and Other Weapons by Baxley
HB 285 Emergency Management by Needelman
HB 339 CS Sexual Predators by Brandenburg
HB 497 Medical Negligence by Cretul
HB 591 CS Electronic Monitoring by Ambler
HB 595 Community Behavioral Health Agencies by Cannon
HB 1057 City of Jacksonville, Duval County by Kravitz
HB 1151 Collier County by Davis, M.

Consideration of the following proposed committee bill(s):

PCB JU 06-07 -- Class Action Lawsuits
PCB JU 06-08 -- Sovereign immunity

Pursuant to Rule 7.22(c), the deadline for amendments to bills on the agenda by non-appointed Members shall be 5:00 p.m., Monday, March 27, 2006.

By the request of the Chair, all Members are asked to have amendments to bills on the agenda by 5:00 p.m., Monday, March 27, 2006.

NOTICE FINALIZED on 03/24/2006 16:27 by Williams.Tanesha

Florida House of Representatives

Judiciary Committee

Allan G. Bense
Speaker

David Simmons
Chair

COMMITTEE ON JUDICIARY

Morris Hall (17 HOB)
March 28, 2006
10:15 a.m. – 12:00 p.m.

Agenda

1. **Call to order**

2. **Roll call**

3. **Welcome and opening remarks**

   Representative David Simmons, Chair

4. **Consideration of the following bills:**

Bill	Sponsor(s)	Title
HB 129	Baxley	Lawful Ownership, Possession, and Use of Firearms and Other Weapons
HB 285	Needelman	Emergency Management
HB 339 CS	Brandenburg	Sexual Predators
HB 497	Cretul	Medical Negligence
HB 591 CS	Ambler	Electronic Monitoring
HB 595	Cannon	Community Behavioral Health Agencies
HB 1057	Kravitz	City of Jacksonville, Duval County
HB 1151	Davis	Collier County

5. Consideration of the following proposed committee bills (PCB):

PCB JU 06-07 Class Action Lawsuits

PCB JU 06-08 Sovereign Immunity

6. Closing remarks

Representative David Simmons, Chair

7. Adjournment

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB JU 06-07 Class action lawsuits
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Judiciary Committee		Hogge	Hogge
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The bill would make policy changes relating to capacity to sue and proof of damage for class action lawsuits.

- ***Capacity to sue.*** The bill would limit membership in any class action filed in Florida state courts to Florida residents, except in certain circumstances. The bill specifically provides that the claimant class may include nonresidents if the conduct giving rise to the claim occurred in or emanated from this state.

- ***Damages.*** The bill would require proof of actual damages to obtain any monetary relief, require claimants to request a specific dollar amount and describe the nature of the injury or damage. The bill also provides that nothing in the bill precludes the attorney general from bringing a class action to recover statutory penalties, if otherwise authorized by law.

The bill also would provide that this act does not affect any class action lawsuits involving federal or state civil rights laws.

The bill would have no discernable fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—The bill limits nonresident participation in class action lawsuits filed in Florida state courts, in certain circumstances.

B. EFFECT OF PROPOSED CHANGES:

Background

Class action lawsuits entail a balancing of policy considerations. On the one hand, no one can be bound by a judgment affecting his interests without his or her day in court.[1] On the other hand, class action lawsuits can "save a multiplicity of suits, reduce the expense of litigation, make legal process more effective and expeditious and make available a remedy that would not otherwise exist."[2]

Regulation of Class Action Lawsuits

The Florida Legislature has enacted legislation regulating class actions lawsuits in a variety of contexts. For instance, the Legislature has:

- expressly authorized class actions for certain subject matter (e.g., in chapters 718, F.S., and 719, F.S., re: condominiums);
- provided that certain provisions of law "shall not be construed to authorize a class action," (e.g., ss. 634.3284, F.S., and 642.0475, F.S., in the Insurance Code);
- prohibited class action lawsuits for certain subject matters (e.g., s. 282.5004, F.S., relating to Y2K-related suits);
- prohibited the use of funds to maintain a class action relating to civil legal assistance for the poor (e.g., s. 68.098, F.S.); and
- made limits on punitive damages inapplicable in certain actions (e.g., s. 768.735, F.S.).

Class action lawsuits generally are not looked upon favorably or are considered inappropriate for certain matters such as contract actions and causes of action based upon fraud and deceit.[3]

The Florida Supreme Court has adopted procedural requirements for class action litigation, including prerequisites for class certification, pleading and notice requirements, and dismissal or compromise.[4] The Florida Rules of Civil Procedure establish four prerequisites for a class action:

- Numerous members: The class is so numerous as to make joinder of the parties impracticable.
- Common questions of law or fact: The representative's claim or defense raises questions of law or fact common to the questions of law or fact raised by each class member.

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[1] Fla. Jur. 2d., PARTIES, s. 34.
[2] Fla. Jur. 2d., PARTIES, s. 37-38.
[3] Fla. Jur. 2d., s. 37-38, at 48-49.
[4] Fla. R. Civ. Pro. 1.220

- Typical claim or defense: The class representative's claim or defense is typical of that of each class member.

- Fair and adequate: The representative can fairly and adequately protect and represent the interests of each class member.[5]

If these four prerequisites are satisfied, the court must next conclude that the class fits into one of three categories: 1) that the prosecution of separate claims would create a risk of inconsistent or varying adjudications resulting in incompatible standards of conduct for the party opposing the class, or, as a practical matter, adjudications dispositive of the interests of other class members; 2) the party opposing the class has acted or refused to act on grounds generally applicable to all class members, making relief appropriate for the class as a whole; or 3) the claim is not maintainable under 1) or 2), but the common questions of law or fact predominate over any question affecting only individual members of the class.[6]

The court then either grants or denies class certification.[7] Once the class is certified, due process requires all potential class members to be notified. These class members may be included in the class or take steps to "opt out."[8] Final judgments of a state court over which it has personal and subject matter jurisdiction are entitled to full faith and credit in any other state court.[9]

Proposed Changes

The bill would make a number of changes affecting class actions in Florida.

Capacity to sue

The bill would limit membership in any class action filed in Florida state courts to Florida residents, but permit expansion to include nonresident claimants under certain circumstances. A court could expand a class to include nonresidents:

- Whose claim is recognized within their state of residence;

- Whose claim is not time barred; and,

- Who cannot assert their rights because their state of residence lacks personal jurisdiction over the defendant.

In addition, the claimant class could include nonresidents if the conduct giving rise to the claim occurred in or emanated from this state.

[Currently, Florida does not limit class membership to Florida residents in class actions filed in Florida state courts. However, in Florida, the Third District Court of Appeal ruled in the case of

[5] Fla. R. Civ. Pro. 1.220(a)
[6] Fla. R. Civ. Pro. 1.220(b)
[7] "The class certification process...does not examine the merits of the underlying claim. Rather, the certification process determines whether a class action is the best manner by which to proceed with litigation. Connell, Michele, "Full Faith and Credit Clause: A Defense to Nationwide Class Action Certification?" 53 Case W.L.Res. L. Rev. 1041, 1050 (Summer 2003).
[8] A state generally must have both subject matter jurisdiction over the case and personal jurisdiction ("minimum contacts" in the case of nonresident defendants, and procedural due process in the case of nonresident plaintiff class members). Personal jurisdiction over plaintiffs becomes an issue in class action lawsuits because typically only the class representative has placed himself under the jurisdiction of the court. Personal jurisdiction over potential members, especially those from another state, can therefore be uncertain. In the case of a nationwide class action, class members can be located in multiple states. Since a judgment in a class action binds all class members, courts have repeatedly held that due process requires that potential nonresident class members be notified of the class action and be given the opportunity to "opt out" of the action. See, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).
[9] Art. I, s. 4, U.S. Const.

R.J. Reynolds v. Engle,[10] that the class should be restricted to Florida residents. This case involved a class of over one million members. The court found it appropriate in this case for a court, in considering whether to certify a class, to consider the effect on the judicial system itself, including the burden on taxpayers.

> Although there is nothing inherently wrong about certifying a national class in a state court action..., where, as here, the class contains so many members from so many different states and territories that it threatens to overwhelm the resources of a state court, it is settled that such a broad-based class is totally unmanageable and cannot be certified.[11]

In other states, in 1977, in Shutts I,[12] the Kansas Supreme Court, in considering the propriety of permitting nonresident class members to be included as class members in a state other than their state of residence, permitted the state court to hear the nationwide class action, citing recent United States Supreme Court cases that had restricted access to the federal courts in class action lawsuits. This, the court said, made it necessary for state courts to hear nationwide class actions:

> Recently the United States Supreme Court has required plaintiffs to assume the cost of notice in common-question class actions. The United States Supreme Court has also refused to aggregate class action claims to meet the $10,000 federal jurisdictional requirements. While the results are supported by the fear of overloading the federal judicial system and the desire not to judicially expand the constitutionally established jurisdictional limits, these recent United States Supreme Court cases have clearly restricted access to federal courts. (In this instance,) (i)f the state courts will not hear the matter, who will grant relief?[13]

Today, with congressional passage of the federal Class Action Fairness Act of 2005, the pendulum has swung the other way: federal courts will now entertain many of these actions. The federal Class Action Fairness Act of 2005, signed into law on February 18, 2005, grants diversity jurisdiction to federal courts over class actions meeting certain criteria. With respect to these changes, Congress found that "(a)buses in class actions undermine the national judicial system,...in that State and local courts are...(A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States."[14]

As a result, Congress vested federal courts with diversity jurisdiction over these actions when the amount in controversy exceeds $5 million in the aggregate, there are at least 100 class members (if a non-federal question class action), and any class member is a citizen of a state different from any defendant. The exercise of jurisdiction by the court is tied to the number of class members from the forum state, as follows:

Proposed class members: residents of forum state	Defendants	Federal jurisdiction
<1/3rd		Must accept

[10] R. J. Reynolds Tobacco Company v. Engle, 672 So.2d 39 (Fla. 3rd DCA 1996).
[11] *Id.* at 42.
[12] Shutts v. Phillips Petroleum Co., 567 P.2d 1292 (Kan. 1977), *cert. denied* 434 U.S. 1068 (1978). In this case, Phillips had argued that the action should be brought in several different state courts. The Kansas Supreme Court disagreed, noting that if the in personam claims of nonresident plaintiff class members were dismissed from the action, those persons would be barred from recovering on their claims elsewhere.
[13] Shutts v. Phillips Petroleum Co., 679 P.2d 1159 (Kan. 1984)
[14] S. 5, Class Action Fairness Act of 2005 (Enrolled as Agreed to or Passed by Both House and Senate), Sec. 2(a)(4).

>1/3rd < 2/3rds	Primary defendants are citizens of forum state	May accept or decline
<2/3rd	One defendant from whom "significant relief" is sought; conduct formed "significant basis" for the claims; and citizen of forum state[15]	Must decline

Certain actions involving securities and corporate governance claims are excluded from the federal act. The federal act also authorizes a defendant to remove a class action from state court to federal court, without regard to whether any defendant is a citizen of the State in which the action is brought.

Damages

The bill would require class action claimants to allege and prove actual damages to obtain any monetary relief. It would recognize that claimants may still seek nonmonetary relief, if appropriate, regardless of whether the class action claimants can prove actual damages. Further, it would provide that nothing in the bill limits the ability of the attorney general to bring a class action to recover statutory penalties, if otherwise authorized by law.

[Florida currently only requires proof of nominal damages, not actual damages, for the recovery of monetary relief in class actions. "Nominal damages" have been defined as "damages of an inconsequential amount[16]...where there is no substantial loss or injury to be compensated...or where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount."[17] In contrast, "actual damages" are damages awarded for "actual and real loss or injury."[18] They are compensatory in nature, designed to replace the loss.]

Civil rights lawsuits

The bill includes a statement that it "does not affect any class action lawsuits involving federal or state civil rights laws."

C. SECTION DIRECTORY:

Section 1. Creates s. 774.01, F.S., relating to class actions; capacity to sue; requiring proof of actual damages.

Section 2. Provides that the act "does not affect any class action lawsuits involving federal or state civil rights laws."

Section 3. Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

[15] In addition, at least one defendant must be a defendant "from whom significant relief is sought by members of the plaintiff class."
[16] Fla. Jur. 2d., DAMAGES, s. 5.
[17] Black's Law Dictionary, 6th Ed., at 392.
[18] *Id.* at 390.

1. Revenues:

   None.

2. Expenditures:

   Indeterminate, but potentially negligible recurring negative fiscal impact for the court system, if the bill leads to a greater number of suits brought as individual actions rather than consolidated into class actions. However, it could produce an indeterminate positive fiscal impact on the court system by reducing the number of complex class action lawsuits involving large numbers of nonresidents.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   Indeterminate, but potentially negligible recurring negative fiscal impact for the clerks of the court, if the bill leads to a greater number of suits brought as individual actions rather than consolidated into class actions. However, it could produce an indeterminate positive fiscal impact on the clerks of court by reducing the number of complex class action lawsuits involving large numbers of nonresidents.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable.

2. Other:

   Privileges and immunities

   Limiting Florida state courts to resident plaintiffs in a class action could implicate the Privileges and Immunities Clause of the United States Constitution. There are two Privileges and Immunities Clauses in the United States Constitution. The Privileges and Immunities Clause of Article IV is relevant to this bill. It provides that "(T)he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[19] This clause prohibits discrimination by states against nonresidents.[20] But, like other constitutional provisions, it is not an absolute. The Clause does not

[19] Art. IV, s. 2, U.S. Const.

[20] The only cases staff could find discussing the application of the Privileges and Immunities Clause to state exclusion of nonresidents from a class action solely based on nonresidency are the Shutts cases out of Kansas. Although the Kansas Supreme Court did not hold that excluding nonresidents would violate the clause, it did reference a commentary from Newberg on Class Actions, s. 1206(d), in which Newberg writes: "...exclusion of non-residents from the class solely on the ground of their non-residency may be an unconstitutional discrimination against non-residents with respect to access to this state's courts, in violation of the Privileges & Immunities Clause of the United States Constitution. Each state court system, while possessing its own jurisdiction, is nevertheless part of a larger network of courts of the several states." Shutts v. Phillips Petroleum Co., 679 P.2d. 1159, 1170 (Kan. 1984) and Shutts

"preclude disparity of treatment in the many situations where there are perfectly valid, independent reasons for it.[21] And, it does not infuse citizens with "new and independent rights."[22]

If confronted with a challenge under the Privileges and Immunities Clause to the distinctions between residents and nonresidents in this bill, the state may defend its position by demonstrating that there is a substantial reason for the difference in treatment, and that the discrimination practiced against nonresidents bears a substantial relationship to the state's objective.[23] The courts will give "due regard for the principle that states should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[24]

In enacting the Class Action Fairness Act of 2005, Congress cited a number of policy reasons for assuming federal jurisdiction over nationwide class actions, many of which might constitute a "substantial reason" for limiting class members to residents of the state in which the action is brought. These include: cases of national importance are being kept out of federal court (presumably where they belong), and state and local courts acting in ways that could bias out-of-state defendants and making judgments that impose their view on other states and bind the rights of the residents of those States.[25] This bill does not recite the specific reasons for the difference in treatment between residents and nonresidents.

Access to courts

Placing limits on the use of Florida courts by nonresidents in a class action could implicate the right to access the courts. There are two sources of the right to access the courts—that implied from the United States Constitution[26] and that expressly provided in the Florida Constitution.

According to Article I, Section 21, of the Florida Constitution:[27]

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The Legislature must not unduly or unreasonably burden or restrict access. The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution.[28] In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the "people of Florida" and, if so, that it has provided a reasonable alternative for redress, unless there is an "overpowering public necessity" for eliminating the right and no alternative method exists.[29]

In this bill, nonresidents are not barred from asserting their rights and the bill does not impose limits on the right of the "people of Florida" to participate in class action lawsuits. The bill neither limits their ability to file an individual action in Florida or in their state of residence, nor file a separate class action in their state of residence. Further, unlike when the Shutts case was decided, the federal courts are now available to as a forum for many of the nationwide class action lawsuits. Further, at least one Florida court has recognized the propriety and necessity of limiting a class to Florida

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v. Phillips Petroleum Co., 567 P.2d 1292 (Kan. 1977), cert. denied 434 U.S. 1068 (1978). However, in Missouri v. Mayfield, 340 U.S. 1, 3-4 (1950), the United States Supreme Court, while recognizing that the Privileges and Immunities Clause prohibits a state from discriminating against citizens of another state, found it to be a "choice within its own control" for a state to "prefer residents in access to often overcrowded Courts and to deny such access to all nonresidents, whether its own citizens or those of other states...."

[21] Am. Jur. 2d., CONSTITUTIONAL LAW, s. 749.

[22] *Id.*

[23] Fla. Jur. 2d., CONSTITUTIONAL LAW, s.388; Lunding v. New York Tax Appeals Tribunal, 118 S. Ct. 766 (U.S. 1998).

[24] Lunding, supra, note 24.

[25] See discussion in body of analysis cited in note 12, *supra.*

[26] The right is not express. The United States Supreme Court, nevertheless, has held that there is such a right arising from several constitutional provisions including the First Amendment, the Due Process Clause, and the Equal Protection Clause. Fla. Jur. 2d., s. 360.

[27] Art. I, s. 22, Fla. Const.

[28] Fla. Jur. 2d., s. 360.

[29] Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

residents because of the burden on the court system and the ability of the court system to manage the class.[30]

Separation of Powers: procedural and substantive changes

This bill could implicate separation of powers. The resolution of this question will turn on whether the provisions affecting class membership are substantive or procedural. If considered to be substantive, the bill would survive a separation of powers challenge. If procedural, it would not.

Article II, Section 3, of the Florida Constitution, provides,

> No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Article III, Section 1, of the Florida Constitution, vests "legislative power" in the Legislature. Article V, Section 2(a), of the Florida Constitution, directs the Supreme Court to adopt rules of "practice and procedure" for all courts.[31] The Legislature does have the power to repeal court rules. In *In re Rules of Criminal Procedure*, Justice Adkins defined "practice and procedure" to encompass the course, form, manner, means, method, mode, order, process, or steps by which a party enforces substantive rights or obtains redress....[32] Rules of practice and procedure include all rules governing the parties, their counsel and courts throughout the progress of the case from the time of its initiation until final judgment and its execution.[33] In contrast, Justice Adkins defined substantive law as consisting of the "rules and principles which fix and declare the primary rights of individuals as respects their persons and property."[34] "Capacity to sue" is an absence of legal disability which would deprive a party of the right to come into court. It is considered a substantive right within the purview of the Legislature.[35]

B. RULE-MAKING AUTHORITY:

None authorized or necessitated by the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

[30] R. J. Reynolds Tobacco Company v. Engle, 672 So.2d 39 (Fla. 3d DCA 1996).
[31] Art. V, s. 2(a), Fla. Const.
[32] Allen v. Butterworth, 756 So.2d 52, 60 (Fla. 2000), Citing In Re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972).
[33] *Id.*
[34] *Id.*
[35] The Florida Bar, In Re Rule 1.220(b), Florida Rules of Civil Procedure, 358 So.2d 95, 97 (Fla. 1977

A bill to be entitled

An act relating to class action lawsuits; creating s. 774.01, F.S.; providing requirements for capacity to file a class action; limiting actions to Florida residents; providing exceptions; providing requirements for monetary relief; eliminating private class action recovery of statutory penalties and other forms of monetary relief other than actual damages; providing monetary relief; providing for availability of nonmonetary relief; providing no effect on class action lawsuits involving civil rights laws; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 774.01, Florida Statutes, is created to read:

774.01 Capacity to sue.--

(1)(a) In any action asserting the right to class action status, the claimant class having capacity to sue shall be limited to residents of this state at the time of the alleged misconduct, except as provided in paragraph (b).

(b) Before issuing the certification order, the court may expand a class to include any nonresident whose claim is recognized within the claimant's state of residence and is not time-barred, but whose rights cannot be asserted because the claimant's state of residence lacks personal jurisdiction over the defendant or defendants. In addition, the claimant class may include nonresidents if the conduct giving rise to the claim occurred in or emanated from this state.

(2) Notwithstanding any law to the contrary, in order to maintain a class action seeking monetary relief, the class must allege and prove actual damages. In any such class action, the monetary recovery shall be limited to the amount of actual damages. This section does not limit or restrict the ability of the Attorney General to bring a class action for the recovery of statutory penalties, if otherwise authorized by law. However, class action claimants may seek to obtain, if appropriate, nonmonetary relief, including injunctive relief, orders or declaratory relief, and orders or judgments enjoining wrongful conduct, regardless of whether the class action claimants can prove any actual monetary damages. This section does not in any way limit or restrict the availability of such nonmonetary relief.

Section 2. This act does not affect any class action lawsuits involving federal or state civil rights laws.

Section 3. This act shall take effect July 1, 2006.

PCB JU 06-08

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB JU 06-08 Sovereign Immunity
SPONSOR(S): Judiciary Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Judiciary Committee		Thomas	Hogge
1)			
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

In 2005, the Florida Supreme Court concluded that, absent an express prohibition in law, a municipal agency has inherent authority to contract with a private party and enter into an indemnification agreement as part of the contract, and may not invoke sovereign immunity to defeat its obligations under the contract. In finding the indemnification clause binding and enforceable, the court reasoned that Florida's sovereign immunity limits apply only to "actions at law against the state or any of its agencies or subdivisions to recover damages in tort." The court noted that the indemnification provision at issue in the case was based on a contract, and as such, was not controlled by the restrictions on the waiver of sovereign immunity.

This bill amends s. 768.28, F.S., to expand the current statutory prohibition against the state or any agency or subdivision of the state from agreeing to waive any defense of sovereign immunity, or increasing the limits of its liability beyond the limitations of the legislative waiver of sovereign immunity in contracts with governmental entities, to include contracts with non-governmental entities. Additionally, any contractual provision for an indebtedness or liability contracted for in violation of this provision is void.

The bill takes effect upon becoming a law and states that the provisions of the act are remedial and, to the extent permitted by law, apply to all existing and future contracts of the state or its agencies or subdivisions.

The bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government - The bill reduces the liability of government by expressly including additional contract provisions within the limits on the waiver of sovereign immunity.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

Municipal Home Rule Power

Florida's Constitution grants municipalities "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services ... except as otherwise provided by law."[1] The Municipal Home Rule Powers Act recognizes these same powers of municipalities, limited only when "expressly prohibited by law."[2] Given this broad grant of home rule power, the courts have held that municipalities may exercise any power for a municipal purpose "except when expressly prohibited by law."[3]

Municipalities have long possessed both the power to execute contracts and the concomitant liability for their breach.[4] In executing contracts, municipalities are presumed to be acting within the broad scope of their authority.[5] In 2005, the Florida Supreme Court concluded that, absent an express prohibition in law, a municipal agency has inherent authority to contract with a private party and enter into an indemnification agreement as part of the contract, and may not invoke sovereign immunity to defeat its obligations under the contract.[6]

Sovereign Immunity and Contractual Indemnification Clauses

The doctrine of sovereign immunity provides that a sovereign cannot be sued without its own permission. The doctrine was a part of the English common law when the State of Florida was founded and has been adopted and codified by the Legislature. Florida law has enunciated three policy considerations that underpin the doctrine of sovereign immunity: (1) preservation of the constitutional principle of separation of powers; (2) protection of the public treasury; and (3) maintenance of the orderly administration of government.[7]

Article X, s. 13 of the Florida Constitution authorizes the Legislature to waive the state's sovereign immunity, specifically providing that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Thus, the courts have long held that only the Legislature has authority to enact a general law that waives the state's sovereign immunity,

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[1] Art. VIII, s. 2(b), Fla. Const.
[2] Section 166.021(1), F.S. (1997).
[3] See, e.g., *City of Ocala v. Nye*, 608 So.2d 15, 16-17 & n. 3 (Fla. 1992); *City of Boca Raton v. Gidman*, 440 So.2d 1277, 1280 (Fla. 1983). See also, *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 133 (Fla. 1957) (noting that "[t]he modern city is in substantial measure a large business institution").
[4] *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).
[5] *Id.*
[6] *Id.*
[7] *Id.*

and that any waiver must be strictly construed.[8] Further, any waiver of sovereign immunity must be clear and unequivocal, and will not be found as a product of inference or implication.[9]

Pursuant to its constitutional authority, in 1973, the Legislature authorized a limited waiver of state sovereign immunity in tort for personal injury, wrongful death, and loss or injury of property through the enactment of s. 768.28, F.S.[10] Today, the state, counties, and municipalities are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances subject to statutory limitations on the amount of liability.[11] Section 768.28(1), F.S., provides in pertinent part:

> In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or of any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Under this statute, immunity is waived for "liability for torts" caused by "the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment."[12] Additionally, subsection (5) of the statute limits state liability to $100,000 per claimant and $200,000 per accident.[13]

American Home Assurance Co. v. Nat'l Railroad Passenger Corp.

In July 2005, the Florida Supreme Court issued its decision in the case of *American Home Assurance Company v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005), in which the court considered whether an indemnification[14] agreement made by a municipal agency, Kissimmee Utility Authority (KUA) with CSX Corporation, Inc. (CSX) was enforceable. The court concluded that the indemnification agreement was binding and enforceable, finding that a municipal agency like KUA has the inherent authority to contract with private parties and enter into an indemnification agreement as part of a contract with a private party and may not invoke sovereign immunity to defeat its obligations under the contract.

In order to improve access to a power plant, the KUA entered into a contract with CSX whereby CSX granted KUA license to build, use, and maintain a private road grade crossing over CSX's railroad tracts. In exchange for the license, KUA agreed to an indemnity provision in the contract under which KUA "assumes all liability for, and releases and agrees to defend, indemnify, protect and save [CSX] harmless" for all loss of or damage to property of CSX or third parties at the crossing or adjacent to it, all loss and damage on account of injury to or death of any person on the crossing, and all claims and liabilities for such loss and damage. The contractual obligation applied regardless of cause and even if

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[8] *Manatee County v. Town of Longboat Key*, 365 So.2d 143, 147 (Fla. 1978).
[9] *Rabideau v. State*, 409 So.2d 1045, 1046 (Fla. 1982); *Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 424 (Fla. 1958).
[10] See ch. 73-313, s. 1, L.O.F.
[11] *American Home Assurance Company v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1022 (Fla. 1979).
[12] Section 768.28(1), F.S. (1997); *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).
[13] Section 768.28(5), F.S.
[14] "Indemnification" is defined as "(t)he action of compensating for loss or damage sustained." "Indemnity" is defined as "(t)o reimburse (another) for a loss suffered because of a third party's or one's own act or default. Blacks Law Dictionary, 8th Ed., 2004.

the injury, death, or property damage is caused solely by the negligence of CSX. Further, the contractual obligation extended to "companies and other legal entities that control, are controlled by, are subsidiaries of, or are affiliated with [CSX], and their respective officers, agents and employees."

In finding the indemnification clause binding and enforceable, the court reasoned that, by its plain language, s. 768.28, F.S., applies only to "*actions at law* against the state or any of its agencies or subdivisions *to recover damages in tort*."[15] The court noted that the indemnification provision at issue in the case was based on a *contract* between KUA and CSX. As such, the court concluded that the statutory provision governing tort recovery actions was not applicable to issues based on contract, and that the contract between KUA and CSX was not controlled by the restrictions on the waiver of sovereign immunity found in s. 768.28, F.S.

Further, the court reasoned that KUA possessed the authority of the City of Kissimmee to enter into contracts for municipal services, including the contract with CSX that contained the indemnification clause and which ensured access to the power plant. The court stated that the parties in the case failed to identify any law prohibiting KUA from executing the contract containing the indemnification provision. In fact, the court found that although KUA did not need an express statutory grant of authority to execute the contract in light of its broad home rule powers, s. 163.01, F.S., grants specific authority to KUA to contract with private parties regarding electrical projects.[16]

The court concluded that the contract requiring the KUA to indemnify CSX was not controlled by statutory restrictions on the waiver of sovereign immunity and was binding and enforceable against KUA.

Effect of Proposed Changes

This bill amends s. 768.28, F.S., to expand the current statutory prohibition against the state or any agency or subdivision of the state from agreeing to waive any defense of sovereign immunity, or increases the limits of its liability beyond the limitations of the legislative waiver of sovereign immunity in contracts with governmental entities, to include contracts with non-governmental entities. "State agency or subdivision" is defined to "include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.[17]

In addition, the bill provides that any contractual provision for an indebtedness or liability contracted for in violation of this provision is void.

Lastly, the bill provides that the act is effective upon becoming law, and is remedial, and to the extent permitted by law, applies to all existing and future contracts of the state or its agencies or subdivisions.

C. SECTION DIRECTORY:

Section 1. Amends s. 768.28, F.S., relating to sovereign immunity.

Section 2. Provides that the bill is effective upon becoming a law.

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[15] Section 768.28(1), F.S. (1997) [emphasis added]; see also *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So.2d 481, 486 (Fla. 2001) (concluding that section 768.28, F.S., "applies only when the governmental entity is being sued in tort"; thus, limitations of section 768.28, F.S., did not apply to restrict award of damages against governmental entity for the erroneous issuance of a temporary injunction).

[16] Section 163.01, F.S., expressly authorizes public agencies to contract with private parties regarding electrical projects.

[17] Section 768.28(2), F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   See D. FISCAL COMMENTS below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   See D. FISCAL COMMENTS below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill reduces the liability of government by expressly including additional contract provisions within the existing limits on the waiver of sovereign immunity. It is unknown what impact this will have on the private sector. See D. FISCAL COMMENTS below.

D. FISCAL COMMENTS:

The bill reduces the liability of government by expressly including additional contract provisions within the existing limits on the waiver of sovereign immunity. Proponents of the bill argue that the bill is codifying the pre-existing understanding of indemnity contract provisions and, therefore, the bill will not have a significant impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

   Impairment of Contracts

   This bill may implicate the Contract Clause of the Florida Constitution, since it attempts to affect existing contracts. Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."[18]

   "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to

[18] Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . . "

existing contracts."[19] The Supreme Court of Florida held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.[20] The Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable.[21] When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy."[22]

Retroactive Application

It is a well-established rule of construction that, in the absence of clear legislative intent to the contrary, a law is presumed to act prospectively only.[23] The basis for retrospective interpretation must be unequivocal and leave no doubt as the legislative intent.[24]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

[19] 10a Fla. Jur. s. 414, Constitutional Law. The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.
[20] *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979). The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.
[21] *Pomponio*, 378 So. 2d at 780.
[22] *Id.*
[23] *State Farm Mutual Automobile Ins. Co. v. Laforet,* 658 So.2d 55 (Fla. 1995); *State v. Zukerman-Vernon Corp.*, 354 So.2d 353 (Fla. 1977), *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977).
[24] *Larson v. Independent Life & Acc. Ins. Co.,* 158 Fla. 623 (Fla. 1947).

A bill to be entitled

An act relating to sovereign immunity; amending s. 768.28, F.S.; providing that no contract of the state or its agencies or subdivisions may waive sovereign immunity for tortious conduct of the state or its agencies or subdivisions beyond the limitations of the legislative waiver of sovereign immunity except as expressly provided by general law; declaring contractual provisions in violation to be void; providing severability; providing that the bill is remedial; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (19) of section 768.28, Florida Statutes, is amended to read:

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.--

(19)(a) Except as otherwise expressly provided by general law, neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into any ~~a~~ contractual relationship ~~with another agency or subdivision of the state~~. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence. This does not preclude a party from requiring a nongovernmental entity to provide such indemnification or

insurance. The restrictions of this subsection do not prevent a regional water supply authority from indemnifying and assuming the liabilities of its member governments for obligations arising from past acts or omissions at or with property acquired from a member government by the authority and arising from the acts or omissions of the authority in performing activities contemplated by an interlocal agreement. Such indemnification may not be considered to increase or otherwise waive the limits of liability to third-party claimants established by this section.

(b) Any contractual provision for an indebtedness or liability contracted for in violation of this subsection shall be void.

Section 2. The provisions of this act are remedial and, to the extent permitted by law, shall apply to all existing and future contracts of the state or its agencies or subdivisions.

Section 3. This act shall take effect upon becoming a law.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

V

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 129 Lawful Ownership, Possession, and Use of Firearms and Other Weapons
SPONSOR(S): Baxley and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 206

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary Committee		Thomas	Hogge
2) Agriculture Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

The bill addresses provisions relating to the storage and transport of firearms in a motor vehicle on property set aside for the parking of a motor vehicle.

The bill provides that a person or entity may not establish, maintain, or enforce a policy or rule that has the effect of prohibiting the otherwise lawful possession of a firearm that is locked in or locked to a motor vehicle that is on any premises set aside for the parking of motor vehicles.

The bill creates a criminal penalty of a third degree felony for violation of the prohibition created by the bill.

The bill provides immunity from civil liability to any person or entity for damages in certain occurrences resulting from the use of a firearm that was lawfully transported and stored in a locked motor vehicle on the person's or entity's property that was set aside for the parking of motor vehicles.

The bill takes effect upon becoming a law.

This bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty: the bill limits the ability of persons and businesses to maintain certain policies related to their premises, but permits lawful possession of a firearm that is locked in or locked to a motor vehicle that is on any premises set aside for the parking of motor vehicles.

Promote Personal Responsibility: the bill provides immunity from civil liability to any person or entity for damages in certain occurrences resulting from the use of a firearm that was lawfully transported and stored in a locked motor vehicle on the person's or entity's property that was set aside for the parking of motor vehicles.

Maintain Public Security: the bill affects policies regarding the possession of firearms in vehicles in certain locations.

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

A firearm is defined as "any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime."[1]

Section 790.053, F.S, provides that it is unlawful to openly carry any firearm or electric weapon, except a person may openly carry a self-defense chemical spray or a nonlethal stun gun or other nonlethal electric weapon that does not fire a or projectile and is designed solely for defensive purposes. A violation of this provision is a misdemeanor of the second degree.

Section 790.06, F.S, provides that the Department of Agriculture and Consumer Services may issue licenses to persons qualified to carry concealed weapons or firearms. A concealed weapon or firearm is defined as "a handgun, electronic weapon or device, tear gas gun, knife, or billie, but the term does not include a machine gun as defined in s. 790.001(9)."

Section 790.25, F.S., provides for the lawful and unlawful ownership, possession, and use of firearms and other weapons. It specifically prohibits the carrying of a concealed firearm or weapon without a permit. This section provides that the provisions of s. 790.053, F.S., and s. 790.06, F.S., discussed above, do not apply to:

- Members of the military, law enforcement, or persons carrying out or training for emergency management duties;
- Guards or messengers of common carriers;
- Members of any organization duly authorized to purchase or receive weapons;
- A person engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition;
- A person engaged in the business of manufacturing, repairing, or dealing in firearms;
- A person firing weapons for testing or target practice;
- A person traveling by private conveyance when the weapon is securely encased or in a public conveyance when the weapon is securely encased and not in the person's manual possession;

[1] Section 790.001(6), F.S.

- A person while carrying a pistol unloaded and in a secure wrapper, concealed or otherwise, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business;
- A person possessing arms at his or her home or place of business; or
- Investigators employed by the several public defenders of the state or the capital collateral representative.

Subsection (5) of s. 790.06, F.S., specifically provides that it is lawful "for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use."

Schools

In addition to the statutes discussed above regarding the possession of firearms, each district school board in Florida is required to have a zero-tolerance policy regarding the possession of firearms by students on school grounds.[2] A violation of the policy must result in a least a one-year expulsion from school and referral to the criminal justice or juvenile justice system. Trespassers that carry a weapon or firearm on school property, public or private, commit a felony of the third degree.[3]

Congress enacted the Gun Free School Zones Act in 1990.[4] It was subsequently overturned by the United States Supreme Court as a violation of Congress's powers under the commerce clause to regulate inter-state commerce.[5] The Act was passed again in 1996 with changes to address the concerns of the Supreme Court that made it only applicable to guns that crossed state lines in commerce.[6] In general, the Act makes it unlawful for any person to possess a firearm in a school zone. The term "school zone" means "in, or on the grounds of, a public, parochial or private school or within a distance of 1,000 feet from the grounds of a public, parochial or private school." The term "school" means "a school which provides elementary or secondary education, as determined under State law." Whoever violates the Act may be fined up to $5,000, imprisoned up to five years, or both. Exceptions to this Act include:

- if the person is licensed to do so;
- if the firearm is not loaded and in a locked container, or a locked firearms rack which is in a motor vehicle;
- by an individual for use in a program approved by a school in the school zone;
- by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;
- by a law enforcement officer acting in his or her official capacity; or
- the firearm is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

Other States

Oklahoma and Alaska have passed laws prohibiting persons and businesses from banning the otherwise lawful possession of a firearm in a locked vehicle in a parking lot.[7] The Oklahoma statute

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[2] Section 1006.13(2), F.S.
[3] Section 810.095, F.S.
[4] P.L. 101-647, Sec. 1702(b)(1), 18 USC ss. 921 and 922.
[5] U.S. v. Lopez, 514 US 549 (1995).
[6] P.L. 104-208.
[7] Alaska Stat. Art. 10A, Sec. 18.65.800; Okla. Stat. tit. 21, Pt. IV, Ch. 53, Sec. 1289.7a.

has not taken effect pending the outcome of federal litigation seeking to overturn the law.[8] Georgia and Indiana have similar legislation pending.[9]

Occupational Violence

An average of 1.7 million people were victims of violent crime while working or on duty in the United States each year from 1993 through 1999, including an average of 1.3 million simple assaults, 325,000 aggravated assaults, 36,500 rapes and sexual assaults, 70,000 robberies, and 900 homicides.[10] In 2001, there were 639 workplace homicides in the U.S., the lowest number since the Census of Fatal Occupational Injuries began in 1992 (just over 80% of these were from shootings). Of the occupations examined, police officers, corrections officers, and taxi drivers were victimized at the highest rates. Businesses can be and have been held liable for crimes occurring on their property where they were found to be negligent in providing security.

Effect of Proposed Changes:

The bill provides that a person or entity may not establish, maintain, or enforce a policy or rule that has the effect of prohibiting the otherwise lawful possession of a firearm that is locked in or locked to a motor vehicle that is on any premises set aside for the parking of motor vehicles. The bill creates a criminal penalty of a third degree felony for violation of the prohibition created by the bill. A third degree felony is punishable, pursuant to s. 775.082 and s. 775.083, F.S., by a term of imprisonment not exceeding 5 years and a fine not to exceed $5,000.

The bill provides to any person or entity immunity from civil liability for damages in certain occurrences resulting from the use of a firearm that was lawfully transported and stored in a locked motor vehicle on the person's or entity's property that was set aside for the parking of motor vehicles. This immunity does not apply if the person or entity commits a criminal act involving the use of such firearm.

The bill provides that a person who is injured due to a policy prohibited by the bill may sue the person or entity with such policy, and if he or she prevails, the court shall award actual damages, court costs, and attorney fees and enjoin any further violations. If an employee who is lawfully transporting or storing a firearm in a locked motor vehicle on property set aside for parking is discharged for violating a policy prohibited under this bill, the employee is entitled to reinstatement to the same or equivalent position, including any fringe benefits and seniority rights, compensation for any lost wages, benefits, or other lost remuneration caused by the termination, and payment of attorney's fees and costs.

The bill defines "motor vehicle" as any automobile, truck, minivan, sports utility vehicle, motorcycle, motor scooter, or any other vehicle required to be registered under Florida law. The bill states that the intent of the new law is "to reinforce and protect the right of each law-abiding citizen to enter and exit any parking lot, parking facility, or space used for the parking of motor vehicles while such person is lawfully transporting and storing a firearm or firearms in the motor vehicle and the firearm or firearms are locked in or locked to the motor vehicle, to avail himself or herself of temporary or long-term parking or storage of a motor vehicle, and to prohibit any infringement of the right to lawful possession of firearms when such firearms are being transported and stored in a vehicle for a lawful purpose."

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[8] The Williams Co. and ConocoPhillips Co. have sued the State of Oklahoma in U.S. District Court, Northern District of Oklahoma, No. 04-CV-820 H(J). The federal court enjoined the enforcement of the statute pending the litigation. It certified to the Court of Criminal Appeals of Oklahoma the question of whether the statute was a criminal statute. The Court of Criminal Appeals ruled that it was a criminal statute in *Whirlpool Corp. v. Henry*, 110 P.3d 83 (Okla. Crim. App. 2005).

[9] House Bill 1028 passed the Committee on Public Safety and Homeland Security in the Indiana House of Representatives on January 25, 2006. House Bill 998 has been referred to the Committee on Public Safety in the Georgia House of Representatives.

[10] Violence in the Workplace, 1993-99, published by the Bureau of Justice Statistics, December 2001 (NCJ 190076).

C. SECTION DIRECTORY:

Section 1. Amends s. 790.25, F.S., relating to the lawful ownership, possession, and use of firearms and other weapons.

Section 2. Amends s. 27.53, F.S., relating to the appointment of assistants and other staff by public defenders to conform a cross-reference.

Section 3. Provides that the bill will become effective upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

While the bill does create a new felony penalty which is unranked on the offense severity chart in s. 921.0013, F.S., third degree felonies rarely result in jail or prison time. The Criminal Justice Estimating Conference routinely classifies new third degree felony penalties as having no fiscal impact or insignificant fiscal impact. See also additional fiscal comments in "D." below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any significant impact on local government revenues. See also additional fiscal comments in "D." below.

2. Expenditures:

The bill does not appear to have any impact on local governments' expenditures. While it does create a new felony penalty, third degree felonies rarely result in jail or prison time. See also additional fiscal comments in "D." below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The economic impact on the private is unclear. Employers that have policies regarding the possession of firearms in vehicles in their parking lots will no longer enjoy these policies. However, employers may enjoy greater protection from liability regarding the use of a firearm in the employer's parking lot that was lawfully stored in a vehicle. It is unknown how many employers have these policies.

D. FISCAL COMMENTS:

The bill creates a criminal penalty of a felony of the third degree. Any third degree felony conviction under the bill's provisions could result in a fine of up to $5,000. Pursuant to s. 142.01, F.S., as of July 1, 2004, fines collected under the penal laws of the state are distributed to the Clerk of Courts of the respective county where the prosecution occurred.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

Preemption

There may be some federal laws that specifically regulate the premises of certain employers, including their parking lots. In its memorandum of law in the case challenging the Oklahoma statute, Haliburton Energy Services, Inc. argues that federal laws regulating nuclear safety,[11] oil and gas operations,[12] and the use of explosives,[13] preempt the state law as it applies to the premises of these businesses.[14] It has also been argued in this same case that the federal Occupational Safety and Health Act[15] preempts the state statute.[16] Federal law is considered to have preempted a specific area of law when Congress has shown its intent to occupy a given field. When Congress is determined to have shown such an intent, a court may strike down a state law that attempts to regulate this same field of law. A Court may find that Congress has completely preempted an area of law or it may find that the preemption is only a partial preemption and some state regulation may be allowed.

Access to Courts

The bill provides immunity for persons and entities from civil liability in lawsuits for certain actions involving the use of firearms. This provision may implicate the "access to court" protections of the Florida Constitution.[17] The Florida Supreme Court has held that that where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.[18] A litigant could argue that the bill denies him or her access to the courts if a cause of action existed under Florida law before the adoption of the access to courts provision in 1968. Should a court find a cause of action did not exist, the judicial inquiry would end at that point. But it is also possible that a court could hold that

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[11] Atomic Energy Act of 1954 (42 USCA § 2011 et seq.).
[12] Pipeline Safety Act (49 USCA § 60101 et seq.).
[13] Explosives Act (18 USCA § 841 et seq.).
[14] *See* Brief of Halliburton Energy Services, Inc., As Amicus Curiae in Support of Plaintiff's Complaint and Plaintiff's Motion for A Permanent Injunction, WHIRLPOOL CORP. v. HENRY, Case No. 04CV 820H (J), United States District Court, N.D. Oklahoma.
[15] 29 U.S.C. § 651, et seq.
[16] *See* Plaintiff's Opening Memorandum in Support of Motion for a Temporary Restraining Order and/or a Preliminary Injunction on behalf of Plaintiff Whirlpool Corporation, WHIRLPOOL CORP. v. HENRY, Case No. 04CV 820H (J), United States District Court, N.D. Oklahoma.
[17] Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *See generally* 10A FLA. JUR. 2D CONSTITUTIONAL LAW §§ 360-69.
[18] *See Kluger v. White*, 281 So. 2d 1 (Fla. 1973).

pre-1968 Florida law would have allowed such suits under the common-law cause of action for negligence. If so, this bill might be evaluated under the *Kluger* standard.

Right to Bear Arms

The Florida Constitution[19] and the U.S. Constitution[20] contain provisions protecting a citizen's right to bear arms. However, these provisions are not implicated without some sort of state action.[21] The Florida Supreme Court, in interpreting Florida's constitutional provision, held that while "the Legislature may not entirely prohibit the right of the people to keep and bear arms, it can determine that certain arms or weapons may not be kept or borne by the citizen."[22]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The effective date of this bill is upon becoming a law. The bill contains a new criminal penalty. Typically, when creating a criminal penalty, the public may need to be given some time to be put on notice of its creation.

The bill applies to policies or rules affecting any property that has been set aside for the parking of motor vehicles. The bill does not distinguish between commercial property or residential property. If the bill is intended to apply to commercial property only, it may need to be clarified.

The bill provides that a person or entity may not establish, maintain, or enforce a policy or rule that has the effect of prohibiting the otherwise lawful possession of a firearm that **is locked in or locked to** a motor vehicle that is on any premises set aside for the parking of motor vehicles. However, the bill provides immunity from civil liability to any person or entity for damages in certain occurrences resulting from the use of a firearm that was lawfully transported and **stored in a locked motor vehicle** on the person's or entity's property that was set aside for the parking of motor vehicles. If these provisions are to be consistent, the bill may need to be amended.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

[19] "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Art. I, s. 8(a), Fla. Const.

[20] "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

[21] *See* Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 A.L.R.4th 93; Constitutional right to bear arms--Federal constitution; generally-- Relationship of right to bear arms to preservation of a militia 79 Am. Jur. 2d Weapons and Firearms § 6.

[22] *Rinzler v. Carson*, 262 So.2d 661, 665 (Fla. 1972).

A bill to be entitled

An act relating to lawful ownership, possession, and use of firearms and other weapons; amending s. 790.25, F.S.; prohibiting specified persons, employers, and business entities from establishing, maintaining, or enforcing any policy or rule that prohibits a person from parking a motor vehicle on property set aside for such purpose when a secured firearm or firearms are being lawfully transported and stored in the motor vehicle; providing a penalty; providing construction; providing for specified immunity from liability; providing civil remedies; defining "motor vehicle" for purposes of the act; providing intent; amending s. 27.53, F.S.; conforming a cross-reference; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 790.25, Florida Statutes, is amended to read:

790.25 Lawful ownership, possession, and use of firearms and other weapons.--

(1) DECLARATION OF POLICY.--The Legislature finds as a matter of public policy and fact that it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property, and the use by United States or state military organizations, and as otherwise now authorized by law, including

the right to use and own firearms for target practice and marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes.

(2) USES NOT AUTHORIZED.--

(a) This section does not authorize carrying a concealed weapon without a permit, as prohibited by ss. 790.01 and 790.02.

(b) The protections of this section do not apply to the following:

1. A person who has been adjudged mentally incompetent, who is addicted to the use of narcotics or any similar drug, or who is a habitual or chronic alcoholic, or a person using weapons or firearms in violation of ss. 790.07-790.12, 790.14-790.19, 790.22-790.24.~~,~~

2. Vagrants and other undesirable persons as defined in s. 856.02.~~,~~

3. A person in or about a place of nuisance as defined in s. 823.05, unless such person is there for law enforcement or some other lawful purpose.

(3) LAWFUL USES.--The provisions of ss. 790.053 and 790.06 do not apply in the following instances, and, despite such sections, it is lawful for the following persons to own, possess, and lawfully use firearms and other weapons, ammunition, and supplies for lawful purposes:

(a) Members of the Militia, National Guard, Florida State Defense Force, Army, Navy, Air Force, Marine Corps, Coast Guard, organized reserves, and other armed forces of the state and of the United States, when on duty, when training or preparing

themselves for military duty, or while subject to recall or mobilization.~~;~~

(b) Citizens of this state subject to duty in the Armed Forces under s. 2, Art. X of the State Constitution, under chapters 250 and 251, and under federal laws, when on duty or when training or preparing themselves for military duty.~~;~~

(c) Persons carrying out or training for emergency management duties under chapter 252.~~;~~

(d) Sheriffs, marshals, prison or jail wardens, police officers, Florida highway patrol officers, game wardens, revenue officers, forest officials, special officers appointed under the provisions of chapter 354, and other peace and law enforcement officers and their deputies and assistants and full-time paid peace officers of other states and of the Federal Government who are carrying out official duties while in this state.~~;~~

(e) Officers or employees of the state or United States duly authorized to carry a concealed weapon.~~;~~

(f) Guards or messengers of common carriers, express companies, armored car carriers, mail carriers, banks, and other financial institutions, while actually employed in and about the shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within this state.~~;~~

(g) Regularly enrolled members of any organization duly authorized to purchase or receive weapons from the United States or from this state, or regularly enrolled members of clubs organized for target, skeet, or trap shooting, while at or going to or from shooting practice; or regularly enrolled members of clubs organized for modern or antique firearms collecting, while

such members are at or going to or from their collectors' gun shows, conventions, or exhibits.~~;~~

(h) A person engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition.~~;~~

(i) A person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person while engaged in the lawful course of such business.~~;~~

(j) A person firing weapons for testing or target practice under safe conditions and in a safe place not prohibited by law or going to or from such place.~~;~~

(k) A person firing weapons in a safe and secure indoor range for testing and target practice.~~;~~

(l) A person traveling by private conveyance when the weapon is securely encased or in a public conveyance when the weapon is securely encased and not in the person's manual possession.~~;~~

(m) A person parking a motor vehicle on any property set aside for the parking of a motor vehicle, whether or not such property is designated as a parking lot, parking facility, or parking space, when a firearm or firearms are being lawfully stored and transported in the motor vehicle and the firearm or firearms are locked in or locked to the motor vehicle.

(n)~~(m)~~ A person while carrying a pistol unloaded and in a secure wrapper, concealed or otherwise, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business.~~;~~

(o)~~(n)~~ A person possessing arms at his or her home or place of business.~~;~~

(p)~~(o)~~ Investigators employed by the several public defenders of the state, while actually carrying out official duties, provided such investigators:

1. Are employed full time;

2. Meet the official training standards for firearms established by the Criminal Justice Standards and Training Commission as provided in s. 943.12(5) and the requirements of ss. 493.6108(1)(a) and 943.13(1)-(4); and

3. Are individually designated by an affidavit of consent signed by the employing public defender and filed with the clerk of the circuit court in the county in which the employing public defender resides.

(q)~~(p)~~ Investigators employed by the capital collateral representative, while actually carrying out official duties, provided such investigators:

1. Are employed full time;

2. Meet the official training standards for firearms as established by the Criminal Justice Standards and Training Commission as provided in s. 943.12(1) and the requirements of ss. 493.6108(1)(a) and 943.13(1)-(4); and

3. Are individually designated by an affidavit of consent signed by the capital collateral representative and filed with the clerk of the circuit court in the county in which the investigator is headquartered.

(4) CONSTRUCTION.--This act shall be liberally construed to carry out the declaration of policy herein and in favor of

the constitutional right to keep and bear arms for lawful purposes. This act is supplemental and additional to existing rights to bear arms now guaranteed by law and decisions of the courts of Florida, and nothing herein shall impair or diminish any of such rights. This act shall supersede any law, ordinance, or regulation in conflict herewith.

(5) POSSESSION IN PRIVATE CONVEYANCE.--Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in s. 776.012.

(6) STORAGE AND TRANSPORT OF FIREARMS IN LOCKED VEHICLE IN PARKING AREA; PENALTY; IMMUNITY FROM LIABILITY.--

(a) No person, property owner, tenant, employer, or business entity shall establish, maintain, or enforce any policy or rule that prohibits or has the effect of prohibiting any person who may lawfully possess, purchase, receive, or transfer firearms from parking a motor vehicle on any property set aside

for the parking of a motor vehicle, whether or not such property is designated as a parking lot, parking facility, or parking space, when the person is lawfully transporting and storing a firearm or firearms in the motor vehicle and the firearm or firearms are locked in or locked to the motor vehicle. Any person, property owner, tenant, employer, or owner of a business entity who violates this paragraph commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in s. 776.012.

(b) No person, property owner, tenant, employer, or business entity shall be liable in any civil action for any occurrence which results from, is connected with, or is incidental to the use of a firearm which is being lawfully transported and stored in a locked motor vehicle on any property set aside for the parking of motor vehicles as provided in paragraph (a), unless the person, property owner, tenant, employer, or owner of the business entity commits a criminal act involving the use of such firearm.

(c)1. A person who is injured, physically or otherwise, as a result of any policy or rule prohibited by paragraph (a) may bring a civil action in the appropriate court against any person, property owner, tenant, employer, or business entity violating the provisions of paragraph (a), including an action to enforce this subsection. If a plaintiff prevails in a civil action related to a policy or rule prohibited by this act, the

court shall award actual damages, enjoin further violations of this act, and award court costs and attorney's fees to the prevailing plaintiff.

2. An employee discharged by an employer or business entity for violation of a policy or rule prohibited under paragraph (a), when such employee was lawfully transporting or storing a firearm in a locked motor vehicle on property set aside by the employer or business entity for the parking of motor vehicles as provided in paragraph (a), is entitled to full recovery as specified in sub-subparagraphs a.-d. In the event the demand for such recovery is denied, the employee may bring a civil action in the courts of this state against the employer and is entitled to:

a. Reinstatement to the same position held at the time of his or her termination from employment, or to an equivalent position.

b. Reinstatement of the employee's full fringe benefits and seniority rights, as appropriate.

c. Compensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the termination.

d. Payment of reasonable attorney's fees and costs incurred.

(d) As used in this section, "motor vehicle" means any automobile, truck, minivan, sports utility vehicle, motorcycle, motor scooter, or any other vehicle required to be registered under Florida law.

(e) It is the intent of this subsection to reinforce and protect the right of each law-abiding citizen to enter and exit

any parking lot, parking facility, or space used for the parking of motor vehicles while such person is lawfully transporting and storing a firearm or firearms in the motor vehicle and the firearm or firearms are locked in or locked to the motor vehicle, to avail himself or herself of temporary or long-term parking or storage of a motor vehicle, and to prohibit any infringement of the right to lawful possession of firearms when such firearms are being transported and stored in a vehicle for a lawful purpose.

Section 2. Subsection (1) of section 27.53, Florida Statutes, is amended to read:

27.53 Appointment of assistants and other staff; method of payment.--

(1) The public defender of each judicial circuit is authorized to employ and establish, in such numbers as authorized by the General Appropriations Act, assistant public defenders and other staff and personnel pursuant to s. 29.006, who shall be paid from funds appropriated for that purpose. Notwithstanding the provisions of s. 790.01, s. 790.02, or s. 790.25(2)(a), an investigator employed by a public defender, while actually carrying out official duties, is authorized to carry concealed weapons if the investigator complies with s. 790.25(3)(p)~~(o)~~. However, such investigators are not eligible for membership in the Special Risk Class of the Florida Retirement System. The public defenders of all judicial circuits shall jointly develop a coordinated classification and pay plan which shall be submitted on or before January 1 of each year to the Justice Administrative Commission, the office of the

President of the Senate, and the office of the Speaker of the House of Representatives. Such plan shall be developed in accordance with policies and procedures of the Executive Office of the Governor established in s. 216.181. Each assistant public defender appointed by a public defender under this section shall serve at the pleasure of the public defender. Each investigator employed by a public defender shall have full authority to serve any witness subpoena or court order issued, by any court or judge within the judicial circuit served by such public defender, in a criminal case in which such public defender has been appointed to represent the accused.

Section 3. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 285 Emergency Management
SPONSOR(S): Needelman and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 568, SB 590

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Domestic Security Committee	8 Y, 0 N	Newton	Newton
2) Judiciary Committee		Hogge	Hogge
3) State Administration Council			
4)			
5)			

SUMMARY ANALYSIS

In New Orleans, following Hurricane Katrina, a number of legally owned weapons were reportedly confiscated by law enforcement agencies. This practice was subsequently halted.

This bill amends s. 252.36, F.S., to provide that nothing in the Florida Emergency Management Act and the Florida Emergency Planning and Community Right to Know Act shall be construed as authorizing the "seizure, taking, or confiscation" of lawfully possessed weapons. Currently, under the Florida Emergency Management Act, the Governor has broad authority to act during a declared state of emergency. The Governor may "issue executive orders, proclamations, and rules" which "shall have the force and effect of law." Specifically, within that act, the Governor may, "in addition to any other powers conferred upon the Governor," suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles during a state of emergency. That same section of current law does not, however, expressly authorize the Governor to order the confiscation of lawfully possessed weapons.

This bill also amends s. 870.044, F.S., to provide that nothing in Chapter 870, F.S., relating to "Affrays; Riots; Routs; Unlawful Assemblies," shall be construed as authorizing the "seizure, taking, or confiscation" of lawfully possessed firearms. Currently, under s. 870.041, F.S., local officers are empowered to declare a state of emergency, generally for a period of 72 hours. Within that Chapter, s. 870.044, F.S., prohibits the sale and intentional display of ammunition and guns or other firearms during a locally declared state of emergency. That section further permits only authorized law enforcement officials or persons in military service acting in the official performance of their duties to display or have firearms in their possession.

Finally, this bill reenacts s. 377.703(3)(a), F.S., which outlines the authority of the governor to impose energy restrictions when energy shortages are anticipated and to carry out the state's energy emergency contingency plan.

This bill does not appear to have a fiscal impact on state and local governments.

The bill takes effect July 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provides limited government: The bill prohibits a construction of certain existing sections of law as permitting government confiscation of firearms during a state of emergency.

Safeguards individual liberty: The bill prohibits a construction of certain existing sections of law as permitting government confiscation of firearms during a state of emergency, thereby enabling individuals to retain their firearms in these circumstances.

Maintain public security: The bill may adversely affect the ability of law enforcement agencies to protect public safety and security. By limiting the ability of law enforcement to be flexible in their responses to emergency conditions, the safety and security of the public may be degraded under certain conditions.

B. EFFECT OF PROPOSED CHANGES:

The Constitution of the United States and the Florida Constitution both guarantee citizens the right to keep and bear arms. This right has been reaffirmed by the decisions of the courts to varying degrees over the course of history. However, some limitations on this right exist in regard to convicted felons and the sale and ownership of certain prohibited weapons. Currently, there are no express statutory provisions prohibiting public officials from confiscating legally owned firearms from law-abiding citizens. However, there are several statutory provisions related to the sale, display, or possession of firearms during a state of emergency.

In New Orleans, following Hurricane Katrina, a number of legally owned weapons were reportedly confiscated by law enforcement agencies. This practice was subsequently halted when concerns were voiced over these actions and a lawsuit was filed by the National Rifle Association.[1] The *New York Times* quoted the superintendent of police as stating that "only law enforcement (is) allowed to have weapons."[2] Legislation has since been introduced in eight states, including Louisiana, to address this issue.[3]

Effects of the Bill

The bill amends s. 252.36, F.S., to provide that nothing in the Florida Emergency Management Act[4] and the Florida Emergency Planning and Community Right to Know Act[5] shall be construed as authorizing the "seizure, taking, or confiscation" of lawfully possessed weapons.

> [Currently, under the Florida Emergency Management Act, the Governor has broad authority to act during a declared state of emergency. A state of emergency generally is limited to 60 days, but may be extended or terminated before 60 days. The Governor may "issue executive orders, proclamations, and rules" which "shall have the force and effect of law."[6] Specifically, within that act, the Governor may, "in addition to any other powers conferred upon the Governor," suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles during a state of

[1] http://www.nraila.org
[2] *New York Times*, September 8, 2005, "New Orleans Begins Confiscating Firearms as Water Recedes."
[3] Alaska: HB 400; Kentucky: HB 290; Mississippi: HB 1141; New Hampshire: HB 1639; Oklahoma: HB 2696; Virginia: HB 1265; also Idaho and Louisiana (unknown).
[4] Sections 252.31-252.60, F.S.
[5] Sections 252.81-252.90, F.S.
[6] Section 252.36(1)(b), F.S.

emergency.[7] That same section of current law does not, however, expressly authorize the Governor to order the confiscation of lawfully possessed weapons.]

The bill also amends s. 870.044, F.S., to provide that nothing in Chapter 870, F.S., relating to "Affrays; Riots; Routs; Unlawful Assemblies," shall be construed as authorizing the "seizure, taking, or confiscation" of lawfully possessed firearms.

[Currently, under s. 870.041, F.S., local officers are empowered to declare a state of emergency, generally for a period of 72 hours. Elsewhere within that Chapter, s. 870.044, F.S., prohibits the sale and intentional display of ammunition and guns or other firearms during a locally declared state of emergency. That section further permits only authorized law enforcement officials or persons in military service acting in the official performance of their duties to display or have firearms in their possession.]

Finally, the bill reenacts s. 377.703(3)(a), F.S., which outlines the authority of the governor to impose energy restrictions when energy shortages are anticipated and to carry out the state's energy emergency contingency plan.

C. SECTION DIRECTORY:

Section 1. Amends s. 252.36, F.S., to provide that certain sections shall not be construed as authorizing lawfully possessed firearms to be seized, taken, or confiscated.

Section 2. Amends s. 870.044, F.S., to provide that certain sections shall not be construed as authorizing lawfully possessed firearms to be seized, taken, or confiscated.

Section 3. Re-enacts s. 377.703(3)(a), F.S., which outlines the authority of the governor to impose energy restrictions when energy shortages are anticipated and to carry out the state's energy emergency contingency plan.

Section 4. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

[7] S. 252.36(5)(h), F.S.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill does not appear to have a fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this joint resolution does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

The bill implicates constitutional considerations under both the United States and Florida Constitutions, including the interplay between the right to keep and bear arms and the emergency powers of the State and local governments. The constitutionality of confiscating legally owned firearms from private citizens for the protection of the common good is open to argument. The State Constitution prohibits any infringement on the right to keep and bear arms while providing for its regulation in the manner by which the State shall choose.

It has been argued in the courts that the right to keep and bear arms is a collective rather than an individual right. In United States v. Miller,[8] the court implied that the rights contained in the Second Amendment of the United States Constitution are only limits on the powers of the federal government and not on the powers of the states. In four Florida cases, the courts held that the right to bear arms is not absolute and the state, through the legislative process, may enact valid police regulations to promote the safety of the general public.[9]

In two recent federal cases, courts have applied opposite precedent, that the right to keep and bear arms is an individual right rather than a collective right. In United States v. Verdugo-Urquirdez, the court held that the term "the people" in the Second Amendment of the United States Constitution had the same meaning as in the Preamble, First, Fourth and Ninth Amendments.[10] Although this case was a Fourth Amendment case, it has applicability to this issue. In Gilbert Equipment Co., Inc. v. Higgins, the court held that the right to keep and bear arms was guaranteed to all Americans.[11]

The Governor has the express statutory authority to issue executive orders, proclamations, and rules and may amend or rescind them as necessary. These executive orders, proclamations, and rules have the force and effect of law during the declared emergency.[12] To the extent this authority, in the context of a state of emergency, emanates from the Governor's "supreme executive power" in Article IV, s. 1 of the Florida Constitution, attempts to statutorily limit the emergency power of the Governor to temporarily suspend rights as granted under the Constitution, one constitutional authority bumps up against another.

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[8] 307 U.S. 174 (1939).

[9] *State of Florida v. Astore, Fla.*, 258 So.2d 33 (Fla. 2d DCA 1972); *Nelson v. State*, 195 So.2d 853 (Fla. 1967); *Davis v. State*, 146 So.2d 892 (Fla. 1962); and *Carlton v. State*, 63 Fla. 1, 58 So. 486 (Fla. 1912).

[10] 110 S.Ct. 3039 (1990).

[11] 709 F. Supp. 1071 (S.D. Ala. 1989), aff'd, 894 F.2d 412 (11th Cir. 1990).

[12] Section 252.36(1)(a) and (5)(a), F.S.

The bill also highlights the question of the rights of the individual verses that of the State to exercise limitations on such rights in protecting the welfare and security of the public at large during a state of emergency. It should be anticipated, if the bill is enacted, that it could be subject to legal scrutiny well beyond the depth of this analysis.

B. RULE-MAKING AUTHORITY:

No additional grant of rulemaking authority is required to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Although the bill indicates that nothing in Chapter 870, F.S., which includes provisions limiting the sale, display, or possession of lawfully possessed firearms, shall be construed to authorize the confiscation of firearms that are lawfully possessed, it does not necessarily mean, as drafted, that it necessarily prohibits restrictions on possession. "Possession" and "confiscation" are different actions. If the intent of the sponsor is to also prohibit restrictions on possession, then the sponsor may consider revising the proposal.

Additionally, the bill states that nothing in this "Chapter" shall be construed in a certain manner, and includes this statement in a specific "section."

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to emergency management; amending s. 252.36, F.S.; providing construction with respect to the authority of the Governor to seize, take, or confiscate firearms in the event of an emergency beyond local control; amending s. 870.044, F.S.; providing construction with respect to the seizure, taking, or confiscation of firearms during a state of emergency; reenacting s. 377.703(3)(a), F.S., relating to the authority of the Governor to utilize specified emergency management powers to carry out emergency actions required by a serious shortage of energy sources under the energy emergency contingency plan of the Department of Environmental Protection, for the purpose of incorporating the amendment to s. 252.36, F.S., in a reference thereto; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (h) of subsection (5) of section 252.36, Florida Statutes, is amended to read:

252.36 Emergency management powers of the Governor.--

(5) In addition to any other powers conferred upon the Governor by law, she or he may:

(h) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles. However, nothing contained in ss. 252.31-252.90

shall be construed to authorize the seizure, taking, or confiscation of firearms that are lawfully possessed.

Section 2. Section 870.044, Florida Statutes, is amended to read:

870.044 Automatic emergency measures.--Whenever the public official declares that a state of emergency exists, pursuant to s. 870.043, the following acts shall be prohibited during the period of said emergency throughout the jurisdiction:

(1) The sale of, or offer to sell, with or without consideration, any ammunition or gun or other firearm of any size or description.

(2) The intentional display, after the emergency is declared, by or in any store or shop of any ammunition or gun or other firearm of any size or description.

(3) The intentional possession in a public place of a firearm by any person, except a duly authorized law enforcement official or person in military service acting in the official performance of her or his duty.

Nothing contained in this chapter shall be construed to authorize the seizure, taking, or confiscation of firearms that are lawfully possessed.

Section 3. For the purpose of incorporating the amendment made by this act to section 252.36, Florida Statutes, in a reference thereto, paragraph (a) of subsection (3) of section 377.703, Florida Statutes, is reenacted to read:

377.703 Additional functions of the Department of Environmental Protection; energy emergency contingency plan; federal and state conservation programs.--

(3) DEPARTMENT OF ENVIRONMENTAL PROTECTION; DUTIES.--The Department of Environmental Protection shall, in addition to assuming the duties and responsibilities provided by ss. 20.255 and 377.701, perform the following functions consistent with the development of a state energy policy:

(a) The department shall assume the responsibility for development of an energy emergency contingency plan to respond to serious shortages of primary and secondary energy sources. Upon a finding by the Governor, implementation of any emergency program shall be upon order of the Governor that a particular kind or type of fuel is, or that the occurrence of an event which is reasonably expected within 30 days will make the fuel, in short supply. The department shall then respond by instituting the appropriate measures of the contingency plan to meet the given emergency or energy shortage. The Governor may utilize the provisions of s. 252.36(5) to carry out any emergency actions required by a serious shortage of energy sources.

Section 4. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 339 CS Sexual Predators
SPONSOR(S): Brandenburg
TIED BILLS: **IDEN./SIM. BILLS:** SB 508

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N, w/CS	Kramer	Kramer
2) Judiciary Committee		Hogge	Hogge
3) Criminal Justice Appropriations Committee			
4) Justice Council			
5)			

SUMMARY ANALYSIS

HB 339 amends the definition of the terms "permanent residence" and "temporary residence" which apply to the sexual predator and sexual offender statutes. A permanent residence will be defined as a place where a person abides, lodges, or resides for 5 or more consecutive days, rather than 14 or more consecutive days. A temporary residence will be defined as a place where a person abides, lodges, or resides for a period of 5 or more days, rather than 14, in the aggregate during any calendar year and which is not the person's permanent residence. This will have the affect of reducing the amount of time that a sexual predator or sexual offender is allowed to reside at a location before he or she must report the residence to law enforcement.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Promote limited government: The bill will require a sexual predator or sexual offender to report a new residence to law enforcement when he or she has been residing at a location for 5 days, rather than 14 days.

B. EFFECT OF PROPOSED CHANGES:

Background:

Sexual Predator Definition: As of November 17, 2005, there were 5,492 sexual predators in the state registry. Section 775.21, F.S., provides that a person convicted of an enumerated sexual offense must be designated a "sexual predator." Specifically, a person must be designated a "sexual predator" if he or she has been convicted of:

1. A capital, life, or first-degree felony violation, or any attempt thereof, of one of the following offenses:
    a. kidnapping or false imprisonment[1] where the victim is a minor and the defendant is not the victim's parent;
    b. sexual battery;[2]
    c. lewd or lascivious offenses;[3]
    d. selling or buying of minors for child pornography;[4] or
    e. a violation of a similar law of another jurisdiction.
2. Any felony violation of one of the following offenses where the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, one of the following offenses:
    a. kidnapping, false imprisonment or luring or enticing a child[5] where the victim is a minor and the defendant is not the victim's parent;
    b. sexual battery;[6]
    c. procuring a person under the age of 18 for prostitution;[7]
    d. lewd or lascivious offenses;
    e. lewd or lascivious battery on an elderly person;[8]
    f. promoting sexual performance by a child;[9]
    g. selling or buying of minors for child pornography; or
    h. a violation of a similar law of another jurisdiction.[10]

Registration of Residence: If the sexual predator is not in the custody or control of, or under the supervision of, the Department of Corrections (DOC), or is not in the custody of a private correctional facility, and the predator establishes or maintains a residence in this state, the predator must initially

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[1] s. 787.01, F.S. or s. 787.02, F.S.,
[2] See chapter 794. F.S.
[3] s. 800.04, F.S.
[4] s. 847.0145, F.S.
[5] s. 787.025, F.S.
[6] Excluded are offenses contained in ss. 794.011(10) and 794.0235, F.S.
[7] s. 796.03, F.S.
[8] s. 825.1025(2)(b), F.S.
[9] s. 827.071, F.S.
[10] Additionally, a person must be designated as a sexual predator if he or she committed one of the offenses listed in a. through h. above and has previously been convicted of the offense of selling or showing obscenity to a minor or using a computer to solicit sexual conduct of or with a minor [ss. 847.0133 or 847.0135, F.S.]

register in person at a Florida Department of Law Enforcement (FDLE) office, or at the sheriff's office in the county of residence within 48 hours after establishing permanent or temporary residence.

The term "permanent residence" is defined as a place where the person abides, lodges, or resides for 14 or more consecutive days. The term "temporary residence" is defined as a place where the person abides, lodges or resides for a period of 15 or more days in the aggregate during any calendar year and which is not the person's permanent residence. For a person whose permanent residence is not in the state, the term includes a place where the person is employed, practices a vocation or is enrolled as a student for any period of time. The term also includes a place where the person routinely abides, lodges, or resides for a period of 4 or more consecutive or nonconsecutive days in any month and which is not the person's permanent residence, including any out-of-state address.

Within 48 hours of initial registration, a sexual predator who is not incarcerated and who resides in the community must register at a driver's license office of the Department of Highway Safety and Motor Vehicles (DHSMV) and present proof of registration, provide specified information, and secure a driver's license, if qualified, or an identification card. Each time a sexual predator's driver's license or identification card is subject to renewal, and within 48 hours after any change in the predator's residence or name, he or she must report in person to a driver's license facility of the DHSMV and is subject to specified registration requirements. This information is provided to FDLE which maintains the statewide registry of all sexual predators and sexual offenders (discussed further below). The department maintains a searchable web-site containing the names and addresses of all sexual predators and offenders as well as a toll-free telephone number.

A sexual predator must report in person every six months to the sheriff's office in the county in which he or she resides to reregister.[11] A sexual predator's failure to comply with registration requirements is a third degree felony.[12]

Sexual offender registration: As of November 17, 2005, there were 30,583 sexual offenders in the state registry. In very general terms, the distinction between a sexual predator and a sexual offender is based on what offense the person has been convicted of, whether the person has previously been convicted of a sexual offense and the date the offense occurred.[13]

A sexual offender is required to report and register in a manner similar to a sexual predator. The definition of the terms "temporary residence" and "permanent residence" are the same as those under the sexual predator statute.[14] Failure of a sexual offender to comply with the registration requirements is a third degree felony.[15]

Effect of HB 339

HB 339 amends the definition of the terms "permanent residence" and "temporary residence" for purposes of the sexual predator and sexual offender registration requirements. A permanent residence will be defined as a place where a person abides, lodges, or resides for 5 or more consecutive days, rather than 14 or more consecutive days. A temporary residence will be defined as a place where a person abides, lodges, or resides for a period of 5 (rather than 14) or more days in the aggregate during any calendar year and which is not the person's permanent residence. This will reduce the

[11] s. 775.21(8), F.S.
[12] s. 775.21(10), F.S.
[13] Specifically, a sexual offender is a person who has been convicted of one of the following offenses and has been released on or after October 1, 1997 from the sanction imposed for the offense: kidnapping, false imprisonment or luring or enticing a child where the victim is a minor and the defendant is not the victim's parent; sexual battery; procuring a person under the age of 18 for prostitution; lewd or lascivious offenses; lewd or lascivious battery on an elderly person; promoting sexual performance by a child; selling or buying a minors for child pornography; selling or showing obscenity to a minor; using a computer to solicit sexual conduct of or with a minor; transmitting child pornography; transmitting material harmful to minors; violating a similar law of another jurisdiction.
[14] s. 943.0435(1)(c), F.S.
[15] s. 943.0435(9)(a), F.S.

amount of time that a sexual predator or sexual offender is allowed to reside at a location before he or she must report the residence to law enforcement. As a result, law enforcement will be able to more quickly identify where sexual predators and sexual offenders are living. As under current law, for a person whose permanent residence is not in the state, a temporary residence will be defined as a place where the person is employed, practices a vocation or is enrolled as a student for any period of time in the state.

C. SECTION DIRECTORY:

Section 1. Amends s. 775.21, F.S.; amending definitions.

Section 2. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The FDLE estimates that the bill will have a non-recurring impact of $70,600 on the department. According to the department's fiscal analysis:

   > Cost estimates reflect documented notification to all registrants within the Florida sexual offender database (currently over 35,000); reprinting and distribution of all related registration, notice of responsibility forms and related documents and system adaptations and reporting requirements.

Notification and documentation to registrants:	$35,500
Update and distribute forms:	$22,700
Criminal Justice Training	$3,400
System Programming:	$9,000
Total:	$70,600

   The bill makes no provision for funding to cover these expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

   To the extent that this bill requires a person to register address changes more frequently, it may have a fiscal impact on a sexual predator or sexual offender.

D. FISCAL COMMENTS:

   See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

   None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

   The bill contains no appropriation to cover the fiscal impact anticipated by the FDLE. The bill could be amended to include a specific appropriation.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

As originally filed, the bill removed part of the definition of temporary residence relating to a person whose permanent residence in not in the state but who works or is enrolled as a student in the state. The Criminal Justice Committee adopted an amendment which reinstated this language.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to sexual predators; amending s. 775.21, F.S.; redefining the terms "permanent residence" and "temporary residence" in order to reduce the number of consecutive days and days in the aggregate which constitute the residence of a sexual predator for purposes of requirements that the predator register with the Department of Law Enforcement, the sheriff's office, or the Department of Corrections; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraphs (f) and (g) of subsection (2) of section 775.21, Florida Statutes, are amended to read:

775.21 The Florida Sexual Predators Act.--

(2) DEFINITIONS.--As used in this section, the term:

(f) "Permanent residence" means a place where the person abides, lodges, or resides for 5 ~~14~~ or more consecutive days.

(g) "Temporary residence" means a place where the person abides, lodges, or resides for a period of 5 ~~14~~ or more days in the aggregate during any calendar year and which is not the person's permanent address~~,~~ or for a person whose permanent residence is not in this state, a place where the person is employed, practices a vocation, or is enrolled as a student for any period of time in this state~~; or a place where the person routinely abides, lodges, or resides for a period of 4 or more consecutive or nonconsecutive days in any month and which is not the person's permanent residence, including any out-of-state address~~.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 497 Medical Negligence
SPONSOR(S): Cretul and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1944

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary Committee		Hogge	Hogge
2) Health Care Regulation Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

The bill would treat the "collection, screening, testing, and processing of blood obtained (by blood banks) from donors for transfusion purposes" as a "professional medical service integral to the care and treatment of patients" and any negligence claim resulting from these activities would be handled as a medical negligence claim. As a result, under current law, presuit notice requirements would apply and damages would be subject to statutory caps.

Blood banks currently are regulated under both federal and, in Florida, state law. In 2003, the Legislature expressly included blood banks as a "health care provider" without qualification as to services performed under the medical negligence laws. However, for purposes of the presuit notice requirements, a "claim for medical malpractice" is defined as a claim "arising out of the rendering of, or the failure to render, medical care or services." In the context of the statute of limitations, in 1992, the Florida Supreme Court refused to apply the medical malpractice statute of limitations to an action against a blood bank, finding it was not a "health care provider" within the statute of limitations because the allegations of negligence did not arise out of "any medical, dental, or surgical diagnosis, treatment, or care." Concurring in part, dissenting in part, Justice Grimes wrote that "...it would be anomalous to conclude that when the Legislature passed the predecessor to (the medical negligence standard of care) in 1977 it intended blood banks to be a health care provider subject to the medical malpractice standard of care and yet at the same time be subject to a different nonmedical malpractice statute of limitations because it was not a health care provider."

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not directly implicate the House Principles.

B. EFFECT OF PROPOSED CHANGES:

PROPOSED CHANGES

The bill would treat the "collection, screening, testing, and processing of blood obtained (by blood banks) from donors for transfusion purposes" as a "professional medical service integral to the care and treatment of patients." As a result, any claim of negligence related to these activities would be considered a medical negligence claim, rather than a general negligence claim.

PRESENT SITUATION

Regulation of blood banks

Federal

The United States government regulates human blood both as a drug and a biologic. The Division of Biologic Standards of the National Institute of Health issued the first blood bank license in 1946.

The primary regulator of blood banks at the federal level is the Department of Health and Human Services (HHS) through the Food and Drug Administration (FDA) and two centers within the FDA—the Center for Biologics Evaluation and Research (CBER) and the Center for Devices and Radiologic Health (CDRH).

The CBER handles the policy side of the regulatory equation. It sets donor interview and testing policy—for example, what types of tests must be conducted (as opposed to how they are to be conducted) and what questions donors should be asked. The CDRH handles the more technical aspect of blood bank operations; that is, it regulates their clinical laboratory operations. It does so through the application of the standards contained in the Clinical Laboratory Improvement Act (CLIA).

To be FDA-licensed or registered, blood banks must comply with regulations of both the CBER and the CDRH, both as a blood bank and as to their clinical laboratory operations. Any blood bank intending to ship blood or blood products in interstate commerce must be licensed; any that do not ship blood or blood products across state lines must only register with the FDA. In Florida, at a minimum, an estimated 80 percent of all blood collected is collected at FDA-licensed facilities.

The FDA inspects both licensed and registered facilities, although most inspections for compliance with CLIA standards are conducted by the American Association of Blood Banks (AABB), a nongovernmental accreditation organization. Furthermore, both must comply with "CGMPs," or "current good manufacturing practices." Inspections focus on such practices as donor screening, blood-borne infectious disease testing, the donor deferral registry, product quarantine and error reporting. Another regulatory agency with some involvement in blood bank regulation is the Occupational Safety and Health Administration.

In certain instances, states impose their own regulations in addition to the federal regulations.

State

At the state level, blood banks are a subset of clinical laboratories regulated by the Agency for Health Care Administration (AHCA) under Chapter 483, F.S. This chapter supplements federal CLIA standards with additional state standards. Since the state has supplemented the CLIA standards, Florida has its own licensing process and operates an inspection program. As a practical matter, however, the AHCA limits its inspections to those facilities that are not AABB-accredited.

Medical negligence

"Medical negligence" is defined as medical malpractice whether grounded in tort or contract[1] and claims/actions for medical malpractice are variously defined in different contexts. For example:

- For purposes of the presuit notice requirements, a "claim for medical malpractice" is defined as a claim "arising out of the rendering of, or the failure to render, medical care or services."[2]

- For purposes of the statute of limitations for medical malpractice actions, "an action for medical malpractice" is defined as a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of "any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care."[3]

Medical negligence involves conduct by a health care provider that results in the injury or death of any person resulting from a breach of the prevailing professional standard of care of that health care provider.[4] Under the medical negligence statute, the claimant must show that the health care provider breached the prevailing standard of care. Blood banks are expressly included within the definition of a "health care provider."[5]

Medical malpractice actions are subject to a two year statute of limitations as opposed to a four year statute for negligence actions and other forms of professional negligence. However, in 1992, the Florida Supreme Court[6] refused to apply the medical malpractice statute of limitations to an action against a blood bank, finding it was not a "health care provider" within the statute of limitations because the allegations of negligence did not arise out of "any medical, dental, or surgical diagnosis, treatment, or care,"[7] the standard expressly adopted by the Legislature in the statute of limitations. Concurring in part, dissenting in part, Justice Grimes wrote that:

> "...it would be anomalous to conclude that when the Legislature passed the predecessor to 766.102 in 1977 it intended blood banks to be a health care provider subject to the medical malpractice standard of care and yet at the same time be subject to a different *nonmedical malpractice* statute of limitations because it was not a health care provider."[8]

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[1]Fla. Stat. 766.202(7) (2005).
[2]Fla. Stat. 766.106(1)(a) (2005).
[3]Fla. Stat. 95.11(4)(b) (2005).
[4]Fla. Stat. 766.102(1) (2005).
[5]Fla. Stat. 766.202(4) (2005). Blood banks have been included within the definition of "health care provider" for medical malpractice purposes since 1977. However, in 1986, the Legislature repealed the section [768.50(2)(b)] cross referenced as the source of the definition of the term "health care provider" for purposes of medical negligence. In 2003, the Legislature re-inserted a definition of "health care provider" in the medical negligence law. That definition included blood banks. See s. 68, Chapter 86-160, L.O.F.
[6]*Silva v. Southwest Florida Blood Bank, Inc.*, 601 So.2d 1184 (Fla. 1992). Concurring in part and dissenting in part, Justice Grimes separated the blood bank's status as a "health care provider" from the issue of whether or not the medical malpractice statute of limitations applied to the action against the blood bank.
[7]The statute governing the limitation period for medical negligence defines these actions as tort or contract claim for damages because of death, injury, or financial loss to any person arising out of "any medical, dental, or surgical diagnosis, treatment, or care by any provider of health care."
[8]See *supra* note 6, at 1190.

Damages[9]

Unlike in negligence actions generally, the amount of noneconomic damages[10] in medical negligence actions are limited by law. Different caps apply in emergency care situations.[11]

Presuit investigation and notice

The medical negligence law also requires the parties to conduct a presuit investigation[12] prior to filing notice of intent to initiate medical negligence litigation.[13]

Mediation and arbitration

The bill permits either or both parties to agree to submit the determination of damages to voluntary binding arbitration.[14] Their decision to accept or reject voluntary binding arbitration has consequences for the amount of damages awardable. If the parties do not agree to voluntary binding arbitration, then they must attend mediation.[15]

C. SECTION DIRECTORY:

Section 1. Amends s. 766.102, F.S., to provide that claims against blood banks for performing certain activities constitutes a medical negligence action.

Section 2. Provides that this act shall take effect on July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

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[9] Fla. Stat. 766.118 (2005). In limiting noneconomic damages, the medical negligence law distinguishes between two categories of defendants: "practitioners," such as physicians and "nonpractitioners" such as hospitals. In most medical negligence cases against practitioners, damages are capped at $500,000 per practitioner per claimant and, against nonpractitioners, $750,000 per claimant. If, in the case of death or entry into a permanent vegetative state (PVS), the trial court determines that these limits would present a "manifest injustice" and the patient suffered a catastrophic injury, then damages of up to twice these amounts may be awarded. In all instances, however, damages from all practitioner defendants in the aggregate may not exceed $1 million and $1.5 million from nonpractitioners. While the law defines the group of "practitioners," it does not define "nonpractitioners."

[10] For purposes of medicial negligence actions, "noneconomic damages" are defined in s. 766.202(8), F.S., to mean "nonfinancial losses that would not have occurred but for the injury giving rise to the causse of action, including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses...." "Economic damages" are not similarly limited by law. As defined in s. 766.202(3), F.S., these are damages for "financial losses that would not have occurred but for the injury giving rise to the cause of action, including...past and future medical expenses and 80 percent of wage loss and loss of earning capacity ...."

[11] There is a $150,000 cap per claimant against practitioners providing emergency services with $300,000 aggregate. There is a $750,000 cap per claimant against non-practitioners providing emergency services with $1,500,000 aggregate.There is no "piercing" of the emergency room cap.

[12] Fla. Stat. 766.203-766.206 (2005).

[13] Fla. Stat. 766.106 (2005).

[14] Fla. Stat. 766.207 (2005).

[15] Fla. Stat. 766.108 (2005).

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate, but blood banks would presumably reduce their exposure to damage awards from negligence lawsuits.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to medical negligence; amending s. 766.102, F.S.; specifying claims of negligence pertaining to certain activities of blood banks as medical negligence claims; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (1) of section 766.102, Florida Statutes, is amended to read:

766.102 Medical negligence; standards of recovery; expert witness.--

(1) In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 766.202(4), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers. <u>With respect to blood banks, the collection, screening, testing, and processing of blood obtained from donors for transfusion constitutes a professional medical service integral to the care and treatment of patients, and any claim of</u>

negligence pertaining to these activities is a medical negligence claim.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 591 CS Electronic Monitoring
SPONSOR(S): Ambler
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice Committee	6 Y, 0 N, w/CS	Cunningham	Kramer
2) Judiciary Committee		Hogge	Hogge
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

This bill expressly authorizes courts to order the pre-trial release of defendants charged with a forcible felony or a sex-related offense for which registration is required, or having been previously convicted of such offense, is subsequently charged with any crime, subject to various conditions including electronic monitoring.

The bill permits a governmental entity or a licensed bail bond agent, meeting certain requirements, to provide monitoring services directly or by contract with a third party vendor. The electronic monitoring device must be capable of identifying the defendant's geographic position to within 9 meters using GPS technology. Defendants must pay a reasonable fee for the service.

Those providing electronic monitoring services are absolved from any liability for equipment failure or criminal acts by the defendant.

The bill requires the chief judge of each circuit to maintain a list of licensed bail bond agents meeting the standards necessary to provide electronic monitoring services. The bill also imposes standards for the electronic monitoring devices. These include, but are not limited to, meeting certain certification standards approved by the FCC, being able to emit or receive signal content 24 hours per day accurate to within 9 meters, possessing encrypted signal content, and being shock resistant.

The bill authorizes and encourages the Departments of Corrections and Juvenile Justice to use electronic monitoring systems in their respective institutions to monitor inmates and juvenile offenders and, under certain circumstances, employees, and visitors. It also requires vendor monitors to achieve certain technological and functional capabilities such as alarm speed, storage capacity, battery life, and accuracy of proximity to location.

The bill creates three new felony offenses relating to the destruction, misuse, or mimicry of electronic monitoring equipment or the recorded data contained in the equipment, for electronic monitors used within a correctional or juvenile facility.

This bill could have a significant negative fiscal impact.

This bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government → This bill authorizes licensed bail bond agents to provide electronic monitoring services for certain pretrial releasees; authorizes and encourages the Departments of Corrections and Juvenile Justice to use electronic monitoring in their respective institutions and to adopt rules relating thereto.

Promote Personal Responsibility → This bill creates new felony offenses related to tampering, misusing, or mimicking electronic monitoring equipment or the recorded data contained in the equipment.

Maintain Public Security → This bill authorizes electronic monitoring of certain pretrial releasees, inmates and juvenile offenders within their respective institutions, and employees and visitors of correctional and juvenile justice facilities.

B. EFFECT OF PROPOSED CHANGES:

Present Situation:

Pretrial Release / Bail Bond Agents

Article I, section 14, of the Florida Constitution provides, with some exceptions, that every person charged with a crime or violation of a municipal or county ordinance is entitled to pretrial release on reasonable conditions.[1] If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.[2]

Courts may impose any number of conditions of pretrial release that are intended to ensure the defendant's presence at trial. Bail, one of the most common conditions of pretrial release, requires an accused to pay a set sum of money to the sheriff. If a defendant released on bail fails to appear before the court at the appointed place and time, the bail is forfeited. As an alternative to posting bail, a defendant may employ the services of a bail bond agent.[3] Bail bond agents do not pay the bail amount, but instead act as a surety, promising to pay the bail amount if the defendant absconds. If the defendant absconds, bail bond agents are authorized to locate, detain, and bring the defendant before the sheriff. Florida bail bond agents are licensed through the Department of Financial Services.

Electronic Monitoring

Electronic monitoring is a process whereby a person's whereabouts are tracked through the use of a transmitter securely attached to the person, and a receiver that receives the transmitter's signal. Currently, electronic monitoring may be imposed as a condition of pretrial release.[4]

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[1] The conditions of pretrial release are determined at a defendant's first appearance hearing. Rule 3.130(a), Fla. R. Crim. Proc.

[2] Rule 3.131(a), Fla. R. Crim. Proc.

[3] s. 648.25, F.S., defines "Professional bail bond agent" as any person who pledges United States currency, United States postal money orders, or cashier's checks as security for a bail bond in connection with a judicial proceeding and receives or is promised therefor money or other things of value.

[4] s. 907.041(4), F.S.

Currently, Florida statutes do not specifically authorize or preclude any entity from providing electronic monitoring services. Such services are currently provided by private companies that contract with the involved agency (Department of Corrections, Department of Juvenile Justice, counties). At this time, neither DOC nor DJJ utilize electronic monitoring systems in their respective institutions.

Florida statutes do not currently provide manufacturing standards for electronic monitoring equipment.

Effect of Proposed Changes

This bill expressly authorizes courts to order the pre-trial release of defendants charged with a forcible felony or a sex-related offense for which registration is required, or having been previously convicted of such offense, is subsequently charged with any crime, subject to various conditions including electronic monitoring.

The bill permits a governmental entity or a licensed bail bond agent, meeting certain requirements, to provide monitoring services directly or by contract with a third party vendor. If provided through a third party vendor, the bail bond agent retains primary responsibility for the monitoring. The electronic monitoring device must be capable of identifying the defendant's geographic position to within 9 meters using GPS technology. Defendants must pay a reasonable fee for the service.[5] The bill requires bail bond agents to keep electronic monitoring records and receipts separate from bail bond records.

Those providing electronic monitoring services are absolved from any liability for equipment failure or criminal acts by the defendant. Those providing electronic monitoring services must report known violations by the defendant to the appropriate authority.

The bill requires the chief judge of each circuit to maintain a list of licensed bail bond agents that annually certify that their electronic monitoring equipment meets certain specified standards. These include meeting certain certification standards approved by the FCC, being able to emit or receive signal content 24 hours per day accurate to within 9 meters, possessing encrypted signal content, and being shock resistant. The chief judge may remove a registered vendor from the list if the vendor fails to properly monitor persons or if the vendor charges an excessive fee for monitoring services. The bill provides that a fee is clearly excessive if the fee charged on a per diem basis is at least twice the average charged by other vendors on the list.

The bill authorizes and encourages the Departments of Corrections and Juvenile Justice to use electronic monitoring systems in their respective institutions to monitor inmates and juvenile offenders and, under certain circumstances, employees, and visitors. It also requires vendor monitors to achieve certain technological and functional capabilities such as alarm speed, storage capacity, battery life, and accuracy of proximity to location.

The bill creates three new third degree felony[6] offenses relating to the destruction, misuse, or mimicry of electronic monitoring equipment or the recorded data contained in the equipment, for electronic monitors used within a correctional or juvenile facility, as follows:

- intentionally altering, tampering with, damaging, or destroying electronic monitoring equipment used to monitor a person in a DOC/DJJ facility, unless such person is the owner of the equipment or agent of the owner performing ordinary maintenance and repairs;

[5] s. 948.33, F.S., provides that Florida bail bond agents may not execute a bail bond without charging a premium therefore. Currently, the premium rate for state bonds may not exceed 10%. http://www.fldfs.com.

[6] A third degree felony is punishable by imprisonment for up to 5 years and a fine of up to $5,000. ss. 775.082, 775.083, F.S.

- developing, building, creating, possessing, or using any device that is intended to mimic, clone, interfere with, or jam the signal of an electronic monitoring device used to monitor a person in a DOC/DJJ facility;

- intentionally altering, tampering with, damaging, or destroying specific data stored by any electronic monitoring equipment used to monitor a person in a DOC/DJJ facility unless done so with written permission from an authorized department official or in compliance with a data-retention policy of the department adopted by rule.

These newly created offenses are unranked on the Offense Severity Ranking Chart in the Criminal Punishment Code. Thus, the third degree felonies will default to a Level 1 offense.

C. SECTION DIRECTORY:

Section 1. Amends s. 648.387, F.S., relating to the provision of electronic monitoring services by licensed bail bond agents.

Section 2. Creates s. 907.06, F.S., providing for electronic monitoring of certain persons on pretrial release; requiring the monitored person to pay fees; authorizing bail bond agents and governmental entities to provide electronic monitoring services; authorizing bail bond agents and governmental entities to subcontract to third-party vendors for electronic monitoring services in certain circumstances; requiring the entity providing electronic monitoring services to report a monitored defendant's violations of pretrial release; providing that the provision of electronic monitoring services is not an undertaking to protect the public from harm; prohibiting a monitored person from tampering with the monitoring equipment.

Section 3. Creates s. 907.07, F.S., requiring the chief judge of each circuit to maintain a list of eligible electronic monitoring vendors; requiring eligible electronic monitoring vendors to register and certify electronic monitoring equipment; providing grounds for removal from the list.

Section 4. Creates s. 907.08, F.S., providing standards for privately owned electronic monitoring devices.

Section 5. Creates s. 907.09, F.S., providing criminal penalties for tampering with, cloning the signal of, or altering or destroying data of an electronic monitoring device.

Section 6. Creates s. 944.161, F.S., providing for electronic monitoring of inmates within correctional facilities; requiring electronic monitoring of certain employees and visitors to correctional facilities; providing system requirements; providing criminal penalties for tampering with, cloning the signal of, or altering or destroying data of an electronic monitoring device; authorizing the Department of Corrections to adopt rules.

Section 7. Creates s. 985.4047, F.S., providing for electronic monitoring of juveniles within juvenile facilities; requiring electronic monitoring of certain employees and visitors to juvenile facilities; providing system requirements; providing criminal penalties for tampering with, cloning the signal of, or altering or destroying data of an electronic monitoring device; authorizing the Department of Juvenile Justice to adopt rules.

Section 8. This act takes effect October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Department of Juvenile Justice
Were it required, the estimated cost of using technology meeting the specifications outlined in the bill for monitoring within DJJ facilities would be as follows:

Total Non-Recurring Costs: $3,060,000
Total Recurring Costs: $3,022,521

Residential Facilities – 144
Non-Recurring Total = $2,592,000
Servers required: 144 programs x $15,000 (cost of server) = $2,160,000
Antennae required: 144 programs x $3,000 (cost of antennae sensors) = $432,000
Recurring Total = $2,187,258
Number of staff: 5,500 x 5 (# of ID's used weekly) x 50 weeks x $.80 (ID cost) = $1,100,000
Number of youth: 6,534 beds x 2 (# of ID's used weekly) x 52 weeks x $.80 (ID cost) = $543,629
Number of visitors: 6,534 beds x 2 (weekly visitors) x 52 weeks x $.80 (ID cost) = $543, 629

Detention Facilities - 26
Non-Recurring Total = $468,000
Servers required: 26 programs x $15,000 (cost of server) = $390,000
Antennae required: 26 programs x $3,000 (cost of antennae) = $78,000
Recurring Total = $835,236
Number of staff: 2500 x 5 (# of ID's used weekly) x 50 weeks x $.80 (ID cost) = $500,000
Number of youth: 2,057 beds x 2 (# of ID's used weekly) x 52 weeks x $.80 (ID cost) = $171,143
Visitors: 17,093 (monthly visitors) x 12 months x $.80 = $164,093

Department of Corrections

The DOC states it would be a significant financial burden on their budget if they were required to use electronic monitoring systems in prisons. For example, according to the DOC, should the DOC be required to use an electronic monitoring system at each of their institutions, this would represent a cost of approximately $31,000,000 (86,000 inmates x $1 x 365 days). The cost of monitoring employees (approximately 20,000) and visitors would be in addition to this figure. The DOC states that the cost of implementing and using such a system would be at the expense of repair, replacement, and enhancement of existing facilities. For example, critical security infrastructure at several institutions could be replaced and/or enhanced for the cost of implementing an electronic monitoring system at one institution. The DOC cites little potential for staff savings should electronic monitoring systems be implemented. Ultimately, the DOC states that the cost effectiveness relative to the department's priorities does not justify the significant resource investment involved.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The DJJ states that counties pay for the cost of pre-adjudicatory detention and, thus, fund approximately 82 percent of the DJJ total detention budget. The numbers below reflect approximately 82 percent of the state detention costs outlined above.

$384,000 – Non-recurring costs for the purchasing of startup equipment in detention centers.
$700,000 – Recurring costs for operating the system.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Licensed bail bond agents who meet the requirements specified in the bill will benefit in that they will be permitted to provide electronic monitoring services for certain pretrial releasees and offenders. Additionally, companies who meet the requirements specified in the bill may benefit in that they would be eligible to provide electronic monitoring services for correctional and juvenile justice facilities.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill provides a general grant of rulemaking power to the Departments of Corrections and Juvenile Justice to implement the bill's provisions (lines 396-398 and lines 519-521). The bill appears to give sufficient rule making authority that is appropriately limited.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On February 22, 2006, the Criminal Justice Committee adopted a strike-all amendment to the bill and reported the bill favorably with committee substitute. The strike-all amendment:

- Removed provisions of the bill relating to post-release offenders;
- Defined the terms "violent felony offense" and "sex-related offense;"
- Corrected grammatical and technical errors; and
- Eliminated the term "Radio Frequency Identification Technology" from the bill.

CHAMBER ACTION

The Criminal Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to electronic monitoring; amending s. 648.387, F.S.; authorizing bail bond agents to be vendors of electronic monitoring services; authorizing bail bond agents to contract with third-party vendors to provide electronic monitoring of pretrial releasees in certain circumstances; authorizing bail bond agents to register with a governmental entity to provide electronic monitoring services in certain circumstances; authorizing such agents to collect a fee for electronic monitoring services; providing that failure to timely pay fees constitutes grounds to remand; providing that such fees are exempt from specified premium requirements; creating s. 907.06, F.S.; providing for electronic monitoring of certain persons on pretrial release; requiring the monitored person to pay fees; providing that provision of electronic monitoring equipment and services is not an undertaking to protect members of the public from harm occasioned by a monitored person; prohibiting a person

being monitored from tampering with monitoring equipment; creating s. 907.07, F.S.; requiring the chief judge of each circuit to maintain a list of licensed bail bond agents who are eligible private vendors for provision of electronic monitoring services; requiring registration of such vendors and certification of electronic monitoring devices; providing grounds for removal from the list; creating s. 907.08, F.S.; providing standards for privately owned electronic monitoring devices; creating s. 907.09, F.S.; providing criminal penalties for tampering with electronic monitoring devices; providing criminal penalties for cloning or jamming the signal of an electronic monitoring device; providing criminal penalties for the alteration or destruction of data stored or transmitted by an electronic monitoring device with specified intent; creating ss. 944.161 and 985.4047, F.S.; providing for electronic monitoring of inmates within correctional facilities and juvenile offenders within juvenile facilities, respectively; requiring such monitoring of certain employees and visitors to such facilities; providing system requirements; prohibiting specified actions relating to such monitoring systems and data from such systems; providing penalties; providing rulemaking authority; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (6) is added to section 648.387, Florida Statutes, to read:

648.387 Primary bail bond agents; duties; electronic monitoring services by licensed bail bond agents.--

(6)(a) A licensed bail bond agent who meets the requirements of s. 907.07 may be a vendor of electronic monitoring services. A licensed bail bond agent may also subcontract for such services with a third-party vendor of the bail bond agent's choice provided the licensed bail bond agent can certify that the equipment and services rendered by such third-party vendor on the bail bond agent's behalf meet the requirements of s. 907.07 for monitoring of a defendant for whom the bail bond agent has provided a criminal surety bail bond. A licensed bail bond agent who meets the requirements of s. 907.07 may additionally register with a governmental entity to provide electronic monitoring services when monitoring has been ordered by a court.

(b) A licensed bail bond agent may charge a reasonable, nonrefundable fee for electronic monitoring services from a person who is subject to electronic monitoring. Failure to timely pay such fees constitutes grounds for the agent to remand such person to the court or sheriff. Fees charged by a bail bond agent associated with required electronic monitoring services are not considered part of the bail bond premium and shall be exempt from the provisions of s. 648.33.

(c) Records and receipts for electronic monitoring provided by a licensed bail bond agent shall be kept separate and apart from bail bond records.

Section 2. Section 907.06, Florida Statutes, is created to read:

907.06 Electronic monitoring.--

(1) The court may order a defendant who has been charged with a forcible felony, as defined in s. 776.08, or a sex-related offense, or who has been charged with any crime and who has been previously convicted of a forcible felony or a sex-related offense, to be released from custody on a surety bond subject to conditions that include, without limitation, electronic monitoring, if electronic monitoring is available in the jurisdiction. For purposes of this section, the term "sex-related offense" includes any of the offenses contained in s. 943.0435(1)(a)1.

(2) A defendant required to submit to electronic monitoring shall pay a reasonable fee for equipment use and monitoring as an additional condition of pretrial release. The failure of the defendant to timely pay such fees constitutes a violation of pretrial release and grounds for the defendant to be remanded to the court or appropriate sheriff or law enforcement agency.

(3) Electronic monitoring shall include the provision of services to continuously receive and monitor the electronic signals from the transmitter worn by the defendant so as to be capable of identifying the defendant's geographic position at any time to within 9 meters using Global Positioning Satellite (GPS) technology, subject to the limitations related to the technology and to circumstances of force majeure. Such electronic monitoring services may be undertaken as a primary

responsibility by a governmental entity or by a licensed bail bond agent who may provide both bail bond services and have primary responsibility or oversight for electronic monitoring services. A governmental entity or licensed bail bond agent may subcontract to a third-party vendor for electronic monitoring services, provided such third-party vendor complies with all provisions of this subsection and s. 907.08 and operates under the direction and control of the governmental entity or licensed bail bond agent with primary responsibility as the vendor for electronic monitoring. A governmental entity that elects to subcontract for electronic monitoring services shall be required to select such third-party vendor through a competitive bidding process.

(4)(a) Any person who provides electronic monitoring services shall report forthwith any known violation of the defendant's pretrial release conditions to the appropriate court, sheriff or law enforcement agency, state attorney, and licensed bail bond agent, if any.

(b)1. Notwithstanding paragraph (a), the provision of electronic monitoring services shall not be deemed to constitute an undertaking to protect members of the public from harm occasioned by a monitored person. The sole duty owed by a person who provides electronic monitoring is to give a law enforcement officer, upon request, an indication of the physical location of the monitored person at any point in time.

2. A person who provides electronic monitoring is not responsible to other persons for equipment failure or for the criminal acts of a monitored person. A provider of electronic

monitoring services cannot control the activities of a monitored person. It is unreasonable for any member of the public to expect that a provider of electronic monitoring services will provide protection against harm occasioned by a monitored person.

(5) A defendant who has been released in accordance with this section shall not alter, tamper with, damage, or destroy any electronic monitoring equipment or data recorded by such equipment. A defendant who is notified of a malfunction in the equipment shall immediately cooperate with the vendor in restoring the equipment to proper functioning. A violation of this subsection constitutes a violation of pretrial release and grounds for the defendant to be remanded to the court or appropriate sheriff or law enforcement agency.

Section 3. Section 907.07, Florida Statutes, is created to read:

907.07 Vendor requirements for provision of electronic monitoring services; vendor registration and certification process.--

(1) This section shall not apply to electronic monitoring provided directly by the state, a county, or a sheriff.

(2) The chief judge of each judicial circuit shall maintain a list of all licensed bail bond agents who are eligible vendors of electronic monitoring in the circuit. For a licensed bail bond agent to be an eligible vendor, a licensed bail bond agent must register in accordance with this section as a vendor capable of providing electronic monitoring services as a primary provider or through a subcontractor in that judicial

circuit. The chief judge shall place on such list of eligible vendors any licensed bail bond agent in this state who certifies in writing, as part of the vendor registration, that all electronic monitoring equipment and electronic monitoring services shall be operated and maintained in compliance with this section, and who agrees as part of such certification to comply with the terms of this section.

(3) Only a governmental entity, or a licensed bail bond agent who is included on a list of eligible vendors under subsection (2), shall be permitted to undertake primary responsibility as a vendor of electronic monitoring services in a judicial circuit of this state.

(4) A licensed bail bond agent shall agree to abide by the following minimum terms as a condition of being included on the list of eligible vendors of electronic monitoring in a given judicial circuit of this state:

(a) The vendor shall register in writing the name of the vendor, who must be a licensed bail bond agent in this state; the name of an individual employed by the vendor who is to serve as a contact person for the vendor; the address of the vendor; and the telephone number of the contact person.

(b) The vendor must initially certify as part of the registration, and must certify in writing at least annually thereafter on a date set by the chief judge, that all of the electronic monitoring devices used by the vendor and any of the vendor's subcontractors comply with the requirements for privately owned electronic monitoring devices in s. 907.08.

(5) A vendor shall promptly notify the chief judge of any changes in the vendor's registration information that is required under this section.

(6) Failure to comply with the registration or recertification requirements of this section shall be grounds for removal from any chief judge's list of eligible vendors for electronic monitoring.

(7) The chief judge, in his or her discretion, may also remove any registered vendor from the list of eligible vendors if the vendor:

(a) Fails to properly monitor any person that the vendor was required to monitor; or

(b) Charges a defendant a clearly excessive fee for use and monitoring of electronic monitoring equipment. Such fees shall be considered clearly excessive if the fees charged on a per diem basis are at least twice the average fee charged by other vendors on the eligible vendor list who provide comparable electronic monitoring equipment and services in that judicial circuit.

Section 4. Section 907.08, Florida Statutes, is created to read:

907.08 Standards for privately owned electronic monitoring devices.--A privately owned electronic monitoring device provided by a vendor must, at a minimum, meet the standards set forth in this section to be used for electronic monitoring of a person under s. 907.06. A device must:

(1) Be a transmitter unit that meets certification standards approved by the Federal Communications Commission.

(2) At the court's discretion, either:

(a) Emit signal content 24 hours per day that identifies the specific device being worn by the defendant and the defendant's physical location using Global Positioning Satellite (GPS) technology accurate to within 9 meters; or

(b) Receive signal content 24 hours per day, determining the defendant's physical location using Global Positioning Satellite (GPS) technology accurate to within 9 meters, recording the defendant's physical locations throughout the day, and being capable of transmitting that record of locations to the vendor at least daily.

(3) With respect to a unit affixed to a defendant, possess an internal power source that provides a minimum of 1 year of normal operation without recharging or replacing the power source. The device must emit signal content that indicates its power status and provides the vendor with notification of whether the power source needs to be recharged or replaced.

(4) Possess and emit signal content that indicates whether the transmitter has been subjected to tampering or removal.

(5) Possess encrypted signal content or another feature designed to discourage duplication.

(6) Be of a design that is shock resistant, waterproof, and capable of reliable function under normal atmospheric and environmental conditions.

(7) Be capable of wear and use in a manner that does not pose a safety hazard or unduly restrict the activities of the defendant.

(8) Be capable of being attached to the defendant in a manner that readily reveals any efforts to tamper with or remove the transmitter upon visual inspection.

(9) Use straps or other mechanisms for attaching the transmitter to the defendant that are either capable of being adjusted to fit a defendant of any size or that are made available in a variety of sizes.

Section 5. Section 907.09, Florida Statutes, is created to read:

907.09 Offenses related to electronic monitoring devices.--

(1) It is illegal for any person to intentionally alter, tamper with, damage, or destroy any electronic monitoring equipment used for monitoring the location of a person pursuant to court order, unless such person is the owner of the equipment or an agent of the owner performing ordinary maintenance and repairs. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) It is illegal for any person to develop, build, create, possess, or use any device that is intended to mimic, clone, interfere with, or jam the signal of an electronic monitoring device used to monitor the location of a person pursuant to court order. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) A person may not intentionally alter, tamper with, damage, or destroy any data stored or transmitted by any

electronic monitoring equipment used for monitoring the location of a person pursuant to court order with the intent to violate such court order or to conceal such a violation. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 6. Section 944.161, Florida Statutes, is created to read:

944.161 Electronic monitoring of inmates within correctional facilities.--

(1) The department is authorized and encouraged to employ electronic monitoring of inmates within its custody who are incarcerated within state and private correctional facilities.

(a) Electronic monitoring services must have the capability to continuously receive and monitor electronic signals from a transmitter worn by an inmate so as to continuously monitor the inmate in real time and identify the inmate's specific geographic position within the facility at any time. Such transmitters must update in at least 5-second intervals and monitor the inmate's geographical location to within at least a 10-foot radius of his or her actual location or to within a radius that is equal to the width of a facility's average size sleeping quarters, whichever is less, subject to the limitations relating to the state of the art of the technology used and to circumstances of force majeure.

(b) Any electronic monitoring system employed shall also provide transmitters to be worn by department employees, employees of private-sector companies contracted to operate correctional facilities, and any visitors to correctional

facilities who are provided access to areas that are designated for authorized personnel only. Such transmitters shall include a panic safety button and must have the capability to continuously receive and monitor electronic signals from a transmitter worn by an employee or visitor so as to continuously monitor employees and visitors in real time and identify their specific geographic positions at any time. Such transmitters must update in at least 5-second intervals and monitor employees and visitors to within a 10-foot radius of their actual location, subject to the limitations relating to the state of the art of the technology used and to circumstances of force majeure.

(c) Any electronic monitoring system employed shall also have the following technological and functional capabilities:

1. Be compatible with a commercially recognized wireless network access standard as designated by the department and have sufficient bandwidth to support additional wireless networking devices in order to increase the capacity for usage of the system by the correctional facility.

2. Be capable of issuing an alarm to an internal correctional monitoring station within 3 seconds after receiving a panic alert from an employee or visitor transmitter or within 3 seconds after violation of the established parameters for permissible movement of inmates, employees, and visitors within the facility.

3.a. Be capable of maintaining a historical storage capacity sufficient to store up to 6 months of complete inmate, employee, and visitor tracking for purposes of follow-up investigations and vendor contract auditing. The system must be

capable of recording for such purposes the continuous uninterrupted movement of all monitored individuals, including those in close proximity to any selected individual, by specific position, not by area or zone. Such historical information must also be capable of being archived by means of electronic data transfer to a permanent storage medium designated as acceptable by the department.

b. In addition, data collected from each facility each day shall be electronically transmitted to an offsite central clearinghouse designated by the department where the data shall be maintained in a secure storage location in a permanent storage medium designated as acceptable by the department as a supplemental backup in order to protect the archived data from alteration and to prevent loss due to disaster or other cause.

4. With respect to a unit affixed to an inmate, be capable of possessing an internal power source that is field rechargeable or that provides a minimum of 1 year of normal operation without need for recharging or replacing the power source. Batteries used in units must be replaceable by correctional employees. The device must emit signal content that indicates the power status of the transmitter and provides the correctional facility monitoring station with notification of whether the power source needs to be recharged or replaced.

5. Possess and emit signal content that indicates whether the transmitter has been subjected to tampering or removal.

6. Possess encrypted signal content or another feature designed to discourage duplication.

7. Be of a design that is shock resistant, waterproof, and capable of reliable function under normal atmospheric and environmental conditions.

8. Be capable of wear and use in a manner that does not pose a safety hazard or unduly restrict the activities of the inmate.

9. Be capable of being attached to the inmate in a manner that readily reveals any efforts to tamper with or remove the transmitter upon visual inspection.

10. Either posses straps or other mechanisms for attaching the transmitter to the inmate which are capable of being adjusted to fit an inmate of any size or must be made available in a variety of sizes.

11. Be designed and constructed in such a way as to resist tampering with or removal by the inmate.

12. Provide a backup power source in the event of a power failure.

(2) A person may not intentionally alter, tamper with, damage, or destroy any electronic monitoring equipment used to monitor the location of a person within a correctional facility, unless the person is the owner of the equipment or an agent of the owner performing ordinary maintenance and repairs. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) A person may not develop, build, create, possess, or use any device that is intended to mimic, clone, interfere with, or jam the signal of an electronic monitoring device used to

monitor the location of a person within a correctional facility. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) A person may not intentionally alter, tamper with, damage, or destroy any data stored pursuant to subparagraph (1)(c)3. unless done so with written permission from an authorized official of the department or in compliance with a data-retention policy of the department adopted by rule. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) The department is authorized to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this section.

Section 7. Section 985.4047, Florida Statutes, is created to read:

985.4047 Electronic monitoring of juvenile offenders within juvenile facilities.--

(1) The department is authorized and encouraged to employ electronic monitoring of juvenile offenders within its custody who are incarcerated within state and private juvenile offender facilities for the purpose or reducing offender on offender violence and reducing employee sexual misconduct as defined in s. 985.4045.

(a) Electronic monitoring services must have the capability to continuously receive and monitor electronic signals from a transmitter worn by a juvenile offender so as to

continuously monitor an offender in real time and identify at any time the offender's specific geographic position within the facility. Such transmitters must update in at least 5-second intervals and monitor the offender's geographical location to within at least a 10-foot radius of his or her actual location or to within a radius that is equal to the width of a facility's average size sleeping quarters, whichever is less, subject to the limitations relating to the state of the art of the technology used and to circumstances of force majeure.

(b) Any electronic monitoring system employed shall also provide transmitters to be worn by department employees, employees of private-sector companies contracted to operate juvenile facilities, and any visitors to juvenile facilities who are provided access to areas that are designated for authorized personnel only. Such transmitters shall include a panic button and must have the capability to continuously receive and monitor electronic signals from a transmitter worn by an employee or visitor so as to continuously monitor employees and visitors in real time and identify their specific geographic positions at any time. Such transmitters must update in at least 5-second intervals and monitor employees and visitors to within a 10-foot radius of their actual location, subject to the limitations relating to the state of the art of the technology used and to circumstances of force majeure.

(c) Any electronic monitoring system employed shall also:

1. Be compatible with a commercially recognized wireless network access standard as designated by the department and have sufficient bandwidth to support additional wireless networking

devices in order to increase the capacity for usage of the system by the facility.

2. Be capable of issuing an alarm to an internal facility monitoring station within 3 seconds after receiving a panic alert from an employee or visitor transmitter or within 3 seconds after violation of the established parameters for permissible movement of offenders, employees, and visitors within the facility.

3.a. Be capable of maintaining a historical storage capacity sufficient to store up to 6 months of complete offender, employee, and visitor tracking for purposes of follow-up investigations and vendor contract auditing. The system must be capable of recording for such purposes the continuous uninterrupted movement of all monitored individuals, including those in close proximity to any selected individual, by specific position, not by area or zone. Such historical information must also be capable of being archived by means of electronic data transfer to a permanent storage medium designated as acceptable by the department.

b. In addition, data collected from each facility each day shall be electronically transmitted to an offsite central clearinghouse designated by the department where the data shall be maintained in a secure storage location in a permanent storage medium designated as acceptable by the department as a supplemental backup in order to protect the archived data from alteration and to prevent loss due to disaster or other cause.

4. With respect to a unit affixed to an offender, be capable of possessing an internal power source that is field

rechargeable or that provides a minimum of 1 year of normal operation without need for recharging or replacing the power source and batteries must be replaceable by facility employees. The device must emit signal content that indicates the power status of the transmitter and provides the facility monitoring station with notification of whether the power source needs to be recharged or replaced.

5. Possess and emit signal content that indicates whether the transmitter has been subjected to tampering or removal.

6. Possess encrypted signal content or another feature designed to discourage duplication.

7. Be of a design that is shock resistant, waterproof, and capable of reliable function under normal atmospheric and environmental conditions.

8. Be capable of wear and use in a manner that does not pose a safety hazard or unduly restrict the activities of the offender.

9. Be capable of being attached to the offender in a manner that readily reveals any efforts to tamper with or remove the transmitter upon visual inspection.

10. Either possess straps or other mechanisms for attaching the transmitter to the offender which are capable of being adjusted to fit an offender of any size or must be made available in a variety of sizes.

11. Be designed and constructed in such a way as to resist tampering with or removal by the offender.

12. Provide a backup power source in the event of a power failure.

(2) A person may not intentionally alter, tamper with, damage, or destroy any electronic monitoring equipment used to monitor the location of a person within a juvenile facility, unless the person is the owner of the equipment or an agent of the owner performing ordinary maintenance and repairs. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) A person may not develop, build, create, possess, or use any device that is intended to mimic, clone, interfere with, or jam the signal of an electronic monitoring device used to monitor the location of a person within a juvenile facility. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) A person may not intentionally alter, tamper with, damage, or destroy any data stored pursuant to subparagraph (1)(c)3. unless done so with written permission from an authorized official of the department or in compliance with a data-retention policy of the department adopted by rule. A person who violates this subsection commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) The department is authorized to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this section.

Section 8. This act shall take effect October 1, 2006.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 595 Community Behavioral Health Agencies
SPONSOR(S): Cannon
TIED BILLS: **IDEN./SIM. BILLS:** SB 280

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary Committee		Thomas	Hogge
2) Health Care Appropriations Committee			
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

The bill limits liability in tort actions involving crisis services provided by detoxification programs, addictions receiving facilities, or designated public receiving facilities. The bill requires that net economic damages be limited to $1 million per liability claim, including, but not limited to, past and future medical expenses, wage loss, and loss of earning capacity. Additionally, any noneconomic damages are limited to $200,000 per claim. The bill allows for any claim to be settled up to the policy limits without action by the Legislature. However, claims for any amount exceeding the limits may be brought to the Legislature as a claims bill in accordance with s. 768.28, F.S.

The bill specifies that the immunities enjoyed by a provider under the provisions of this act extend to an employer of the provider when the employee is acting in furtherance of the provider's responsibilities under its contract with the Department of Children and Families. However, these immunities are not applicable to a provider or employee who acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury or death.

The bill requires each provider obtain and maintain general liability insurance coverage in the amount of $1 million per claim and $3 million per incident.

Conditional limitations on damages specified by the act are increased at the rate of 5 percent each year, to be prorated from its effective date to the date at which damages subject to such limitations are awarded by final judgment or settlement.

The effective date of this bill is July 1, 2006.

The bill does not appear to have a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government—The bill mandates that each provider obtain and maintain general liability insurance coverage in the amount of $1 million per claim and $3 million per incident.

Promote personal responsibility—The bill limits the liability of a provider in certain civil actions. Recovery for amounts above the limits specified in the bill, if approved by the Legislature in a claims bill, will originate from the state budget.

Empower families—To the extent that providers reduce their costs for liability insurance and from legal immunity, the offering of services, with the attendant emotional and financial benefits, may increase for families.

B. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Background on the Provision of Mental Health Services Prevention of Substance Abuse

Part I of ch. 394, F.S., is the Florida Mental Health Act, also known as "the Baker Act." The Baker Act describes the criteria and process for the involuntary examination of a person who is believed to have a mental illness and, because of that illness, has refused voluntary examination or is unable to determine that an examination is necessary and is a danger to self or others or likely to suffer from self-neglect to the degree that it endangers his or her well-being. The statute authorizes law enforcement, certain mental health clinical professionals, or the court to require that an individual be involuntarily detained for evaluation for a period up to 72 hours.

In addition to procedural requirements for involuntary examination and voluntary and involuntary treatment, the Baker Act provides a framework for the public mental health service delivery system. The "front door" to that system is the public receiving facility. Receiving facilities admit persons for involuntary examination and are defined in the statute as "any public or private facility designated by the Department of Children and Families (DCF) to receive and hold involuntary patients under emergency conditions or for psychiatric evaluation and to provide short-term treatment."[1] Public receiving facilities are those facilities that receive public funds specifically for Baker Act examinations. Under s. 394.459(2), F.S., receiving facilities are required to examine and provide treatment to everyone, regardless of their diagnosis or ability to pay. Public receiving facilities are usually co-located with a community mental health provider agency or a public hospital.

A crisis stabilization unit is defined as "a program that provides an alternative to inpatient hospitalization and that provides brief, intensive services 24 hours a day, seven days a week, for mentally ill individuals who are in an acutely disturbed state."[2] The definition of "crisis stabilization unit" and licensure requirements for these programs are found in pt. IV of ch. 394, F.S., the Community Substance Abuse and Mental Health Services Act.

Part V of ch. 397, F.S., provides criteria and procedures for the involuntary admission of an individual in an acute substance abuse crisis. A person meets the criteria for involuntary admission if he or she is substance abuse impaired and because of such impairment has lost the power of self-control with respect to substance use and either is likely to harm himself or herself or others or is in need of substance abuse services and his or her judgment has been so impaired that the person is unable to

[1] Section 394.455(26), F.S.
[2] Section 394.67(5), F.S.

appreciate the need for treatment or services.[3] An individual may be compelled to emergency admission for detoxification, assessment, or stabilization through one of several pathways including law enforcement, physician certification, parent or guardian consent, or court order.

Substance abuse providers may be licensed by the DCF for one or several separate service components.[4] Included in these licensed service components are detoxification programs and addictions receiving facilities. Detoxification services may be provided within a facility that is licensed as a substance abuse treatment program or in a hospital licensed under ch. 395, F.S. Addictions receiving facilities (ARFs) are state-owned, state-operated, or state-contracted programs licensed by the DCF and designated as secure facilities to provide an intensive level of care. All persons admitted to ARFs are considered clients of the DCF and their admission cannot be denied solely on the basis of their inability to contribute to the cost of their care.[5] However, admission may be denied due to failure to meet admission criteria, medical or behavioral conditions beyond management capabilities of the program, or lack of space, services, or financial resources to pay for care.[6] Detoxification services may be provided on a residential or outpatient basis to assist an individual with the physiological and psychological withdrawal from the effects of substance abuse. While most of these programs are funded by the DCF, some of them are private, for-profit organizations that receive no funding from the DCF.

As of FY 2004-05, the DCF maintained contracts with 168 substance abuse providers and 249 community mental health provider agencies. There are currently 75 public receiving facilities and 53 private receiving facilities designated by the DCF. Among the public facilities, 47 are licensed by the Agency for Health Care Administration and designated as Crisis Stabilization Units. The agency may not issue a license to a crisis stabilization unit unless the unit receives state funds. Of the substance abuse providers, 32 provide substance abuse detoxification services and 10 are licensed as ARFs. In FY 2004-05, services were provided to 69,059 individuals through mental health or substance abuse crisis services agencies under contract with the DCF.

Current DCF contracts specify that a provider is an independent contractor and not an agent of the department and that the provider agrees to indemnify, defend and hold the department, its agencies, officers, and employees harmless from all claims, suits, judgments, or damages including attorneys' fees arising out of any act, actions, neglect or omission by the provider, its agents or employees. According to the Florida Council for Community Health (the "Council"), approximately 98% of persons served by these facilities are low income, uninsured individuals, or Medicaid eligible and virtually all funding for receiving facilities comes from local, state and federal government sources.

According to the Council, the cost of medical malpractice liability insurance is limiting the ability of publicly supported community mental health and substance abuse agencies to provide critical treatment and intervention services that are relied upon by law enforcement, local communities and state agencies. The Council states that medical malpractice insurance rates for community mental health and substance abuse agencies have increased 105% over the past three years, approximately 35% per year. In some cases, 5% or more of a facility's operating budget is used to pay for liability insurance.

The average cost of liability insurance for a community behavioral health provider was $238,847 in FY 2002-03. The average yearly cost in FY 2003-04 was $355,715, and increase of 49%. As an example of the impact on treatment capacity, a community mental health provider could have provided an additional 1,457 bed days of crisis stabilization care in lieu of paying for liability insurance during FY 2003-04. The following chart provided by the Council shows examples of the escalation of liability insurance premiums (which includes medical malpractice, officers and directors insurance and other liability insurance) for a sample of behavioral health care providers:

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[3] Section 397.675, F.S.
[4] Section 397.311(18), F.S.
[5] Section 397.431(5), F.S.
[6] Section 397.6751, F.S.

Sample of Community Providers' Annual Insurance Premium Increases
FY 2002-03 through FY 2005-06

Facility	FY 2002-03 Premiums	FY 2003-04 Premiums	FY 2004-05 Premiums	FY 2005-06 Premiums	% Increase from '02-03 to '05-06
Act Corporation	$391,000	$425,000	$582,061	$619,603	58.5%
Lakeview Center	$555,301	$793,063	$1,063,966	$1,236,461	122.7%
Personal Enrichment	$72,315	$225,662	$187,556	$159,454	120.5%
Meridian Behavioral Health	$306,364	$420,174	$520,896	$543,201	77.3%
Apalachee Center	$95,630	$247,239	$186,031	$272,355	184.8%
Bayview Center	$59,280	$88,952	$119,629	$137,646	132.2%
Manatee Glens	$99,744	$125,379	$137,404	$162,473	62.9%
LifeStream	$137,843	$167,463	$221,535	$257,879	87.1%
Bridgeway	$160,250	$281,539	$219,817	$238,270	48.7%
Average Cost / % Change	$208,636	$308,275	$359,877	$403,038	93.18%

Source: Florida Council for Behavioral Healthcare, Helping Florida Families in Crisis: Liability Limits for State Funded Detoxification and Public Receiving Facilities, January 1, 2006

Report by the Department of Children and Families on the Experience of Public Receiving Facilities in Securing and Maintaining Medical Malpractice Insurance

In 2004, the Florida Legislature, in proviso language in the General Appropriations Act, mandated that the DCF develop a report that reviewed the experience of public receiving facilities in securing and maintaining medical malpractice insurance. The review was to include the current cost of insurance and the rate of increase or decrease in these costs over the past three years and the experience of these facilities with lawsuits and associated awards. The department was directed to investigate whether these facilities were experiencing problems with malpractice insurance and the impact such problems have on service delivery. The department delivered the report to the Governor and the Senate and House Appropriations committees by December 31, 2004.

The report states that the median cost of insurance for public receiving facilities rose by 72.5 percent during the four years 2001 to 2004, from $15,210 in FY 2001-02 to $26,239 in FY 2003-04. During this same period, the reporting agencies' acute care budgets increased by 23.01 percent.

Similar Statutory Provisions

Liability limits and immunity provisions similar to those proposed in this bill are extended to health care[7] and other providers serving inmates of the state correctional system,[8] providers under contract with the Department of Juvenile Justice,[9] and eligible child welfare lead agencies.[10] These immunities are not applicable to a provider or employee who acts in a culpably negligent manner or with willful and wanton disregard or unproved physical aggression when such acts result in injury or death.

EFFECT OF PROPOSED CHANGES

The bill creates s. 394.9085, F.S., to provide that certain facilities or programs [a detoxification program defined in s. 397.311(18)(b), F.S, an addictions receiving facility defined in s. 397.311(18)(a), F.S., or a designated public receiving facility defined in s. 394.455(26), F.S.] shall have liability limits in tort actions based on services for crisis stabilization. The bill requires that net economic damages be limited to $1 million per liability claim, including, but not limited to, past and future medical expenses, wage loss, and loss of earning capacity. The bill also specifies that damages be offset by any collateral source payment that is paid in accordance with s. 768.76, F.S. Additionally, any noneconomic

[7] Section 456.048, F.S.
[8] Section 946.5026, F.S.
[9] Section 985.31(5)(d), F.S.
[10] Section 409.1671(1)(h), F.S.

damages specified against the entities specified by this bill are limited to $200,000 per claim. The bill allows any claim to be settled up to the policy limits without action by the Legislature. However, claims for any amount exceeding the limits specified by this bill may be brought to the Legislature as a claims bill in accordance with s. 768.28, F.S. The provider or its insurer must assume any costs for defending actions brought under this section.

The bill specifies that the immunities enjoyed by a provider under the provisions of this act extend to an employee of the provider when the employee is acting in furtherance of the provider's responsibilities under its contract with the DCF. However, these immunities are not applicable to a provider or employee who acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury or death.

The bill specifies that a person who provides contractual services to the DCF is not an employee or agent of the state for the purposes of ch. 440, F.S. (Worker's Compensation). The bill requires each provider obtain and maintain general liability coverage in the amount of $1 million per claim and $3 million per incident.

The bill additionally specifies that the conditional limitations on damages specified by this act shall be increased at the rate of five percent each year, to be prorated from its effective date to the date at which damages subject to such limitations are awarded by final judgment or settlement.

C. SECTION DIRECTORY:

Section 1. Creates 768.0755, F.S., relating to behavioral provider liability.

Section 2. Provides that the bill takes effect on July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   This bill does not appear to have a fiscal impact on state revenues.

2. Expenditures:

   This bill does not appear to have a fiscal impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   This bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

   This bill does not appear to have a fiscal impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The provisions of this bill limit the economic damages recoverable by certain individuals who have been damaged in tort and require that certain substance abuse and mental health providers purchase general liability coverage.

The Department of Children and Family Services reports that limiting the damages awarded to an individual may have a direct positive impact on certain mental health and substance abuse providers by containing the cost of their insurance premiums, thereby reducing their administrative costs.

To the extent that providers reduce their costs for insurance and legal fees, there may be increased funding available for services. Conversely, to the extent that injured persons are not able to recover fully for their injuries, more families may be dependent on government-funded assistance programs.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this joint resolution does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

2. Other:

Access to Courts

Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[11] The Legislature must not unduly or unreasonably burden or restrict access. The Florida Constitution protects "only rights that existed at common law or by statute prior to the enactment of the Declaration of Rights of the Florida Constitution."[12] In order to make a colorable claim of denial of access to courts, an aggrieved party must demonstrate that the Legislature has abolished a common-law right previously enjoyed by the people of Florida and, if so, that it has not provided a reasonable alternative for redress and that there is not an "overpowering public necessity" for eliminating the right.[13]

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

There appears to be a technical drafting error in s. 394.9085(2) of the bill. The first sentence appears to be missing the phrase "as described in this section," which should be inserted after the first two words of the first sentence.

There also appears to be a technical error in the second sentence of s. 394.9085(2) of the bill concerning the reference to "immunities from liability enjoyed by such providers extend as well to each employee of the provider ...." The bill does not provide for immunity from liability, but rather, for limitations on liability. Finally, a similar technical error appears to occur in the last sentence of s. 394.9085(2) of the bill, where it again refers to "immunities."

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

N/A

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[11] *See generally* 10A FLA. JUR. 2D CONSTITUTIONAL LAW §§ 360-69.
[12] Fla. Jur. 2d., s. 360.
[13] Kluger v. White, 281 So.2d 1, 4 (Fla. 1973).

A bill to be entitled

An act relating to community behavioral health agencies; creating s. 394.9085, F.S.; providing that certain facilities or programs have liability limits in tort actions under certain circumstances; limiting net economic damages allowed per claim; requiring that damages be offset by collateral source payment in accordance with s. 768.76, F.S.; providing for claims bills to be filed with the Legislature; requiring that costs to defend actions be assumed by the provider or its insurer; specifying occasions upon which immunities enjoyed by the provider extend to the employee; requiring that providers obtain and maintain specified liability coverage; specifying that persons providing contractual services to the state are not considered agents or employees under ch. 440, F.S.; providing for an annual increase in the conditional limitations on damages; providing definitions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 394.9085, Florida Statutes, is created to read:

394.9085 Behavioral provider liability.--

(1) In any tort action based on services provided for crisis stabilization brought against a detoxification program, an addictions receiving facility, or a designated public receiving facility, net economic damages shall be limited to $1

million per liability claim, including, but not limited to, past and future medical expenses, wage loss, and loss of earning capacity, offset by any collateral source payment paid in accordance with s. 768.76. In any tort action based on services provided for crisis stabilization brought against any detoxification program, an addictions receiving facility, or a designated public receiving facility, noneconomic damages shall be limited to $200,000 per claim. Any claim may be settled up to policy limits without further act of the Legislature. A claims bill may be brought on behalf of a claimant pursuant to s. 768.28 for any amount exceeding the limits specified in this subsection. Any costs in defending actions brought under this section shall be assumed by the provider or its insurer.

(2) The liability of a detoxification program, an addictions receiving facility, or any designated public receiving facility shall be exclusive and in place of all other liability of such provider. The same immunities from liability enjoyed by such providers extend as well to each employee of the provider when the employee is acting in furtherance of the provider's responsibilities under its contract with the department. Such immunities do not apply to a provider or employee who acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression if such acts result in injury or death.

(3) The eligible provider under this section must, as part of its contract, obtain and maintain a minimum of $1 million per claim and $3 million per incident in general liability coverage.

(4) This section does not designate a person who provides

contracted services to the department as an employee or agent of the state for purposes of chapter 440.

(5) The Legislature is cognizant of the increasing costs of goods and services each year and recognizes that fixing a set amount of compensation actually has the effect of a reduction in compensation each year. Accordingly, the conditional limitations on damages in this section shall be increased at the rate of 5 percent each year, prorated from July 1, 2006, to the date at which damages subject to such limitations are awarded by final judgment or settlement.

(6) For purposes of this section, the terms "detoxification program," "addictions receiving facility," and "receiving facility" have the same meanings as those provided in ss. 397.311(18)(b), 397.311(18)(a), and 394.455(26), respectively.

Section 2. This act shall take effect July 1, 2006.

HOUSE OF REPRESENTATIVES LOCAL BILL STAFF ANALYSIS

BILL #: HB 1057 City of Jacksonville, Duval County
SPONSOR(S): Kravitz
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Local Government Council	8 Y, 0 N	Camechis	Hamby
2) Judiciary Committee		Hogge	Hogge
3) Justice Council			
4)			
5)			

SUMMARY ANALYSIS

In 2005, the Florida Supreme Court concluded that, absent an express prohibition in law, a municipal agency has inherent authority to contract with a private party and enter into an indemnification agreement as part of the contract, and may not invoke sovereign immunity to defeat its obligations under the contract.

This bill amends the charter of the City of Jacksonville to prohibit the City or any independent agency of the City from agreeing to waive sovereign immunity for tortious conduct of the City or of any such independent agency beyond the limitations of the legislative waiver of sovereign immunity established in section 768.28, F.S.

The bill further provides that a contract of the City or any independent agency may not agree to indemnify, defend, or hold harmless another party for the tortious conduct of any party other than the city or the independent agency, respectively. Any contractual provision for an indebtedness or liability contracted for in violation of this provision is void and must be severed from the contract.

According to the Economic Impact Statement, this bill will not have a fiscal impact in fiscal years 2005-06 or 2006-07; however, enactment of the bill will "avoid limitless liability for the tortuous conduct of third parties."

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not implicate any of the House principles.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

The City of Jacksonville and Duval County merged in 1968,[1] creating a single consolidated government entity (City) governing all of Duval County with the exception of the beach communities (Atlantic Beach, Neptune Beach and Jacksonville Beach) and Baldwin. The City government operates under a mayor as head of the administrative branch and a 19-member City Council as the legislative branch.

Municipal Home Rule Power

Florida's Constitution grants municipalities "governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services ... except as otherwise provided by law."[2] The Municipal Home Rule Powers Act recognizes these same powers of municipalities, limited only when "expressly prohibited by law."[3] Given this broad grant of home rule power, the courts have held that municipalities may exercise any power for a municipal purpose "except when expressly prohibited by law."[4]

Municipalities have long possessed both the power to execute contracts and the concomitant liability for their breach.[5] In executing contracts, municipalities are presumed to be acting within the broad scope of their authority.[6] In 2005, the Florida Supreme Court concluded that, absent an express prohibition in law, a municipal agency has inherent authority to contract with a private party and enter into an indemnification agreement as part of the contract, and may not invoke sovereign immunity to defeat its obligations under the contract.[7]

Sovereign Immunity and Contractual Indemnification Clauses

The doctrine of sovereign immunity provides that a sovereign cannot be sued without its own permission. The doctrine was a part of the English common law when the State of Florida was founded and has been adopted and codified by the Legislature. Florida law has enunciated three policy considerations that underpin the doctrine of sovereign immunity: (1) preservation of the constitutional principle of separation of powers; (2) protection of the public treasury; and (3) maintenance of the orderly administration of government.[8]

Article X, s. 13 of the Florida Constitution authorizes the Legislature to waive the state's sovereign immunity, specifically providing that "[p]rovision may be made by general law for bringing suit against

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[1] Ch. 67-1320, L.O.F.
[2] Art. VIII, § 2(b), Fla. Const.
[3] § 166.021(1), Fla. Stat. (1997).
[4] See, e.g., *City of Ocala v. Nye*, 608 So.2d 15, 16-17 & n. 3 (Fla.1992); *City of Boca Raton v. Gidman*, 440 So.2d 1277, 1280 (Fla.1983); see also *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130, 133 (Fla.1957) (noting that "[t]he modern city is in substantial measure a large business institution").
[5] *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).
[6] *Id.*
[7] *Id.*
[8] *Id.*

the state as to all liabilities now existing or hereafter originating.". Thus, the courts have long held that only the Legislature has authority to enact a general law that waives the state's sovereign immunity, and that any waiver must be strictly construed.[9] Further, any waiver of sovereign immunity must be clear and unequivocal, and will not be found as a product of inference or implication.[10]

Pursuant to its constitutional authority, in 1973 the Legislature authorized a limited waiver of state sovereign immunity in tort for personal injury, wrongful death, and loss or injury of property through the enactment of s. 768.28, F.S.[11] Today, the state, counties, and municipalities are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances subject to statutory limitations on the amount of liability.[12] Section 768.28(1), F.S., provides in pertinent part:

> In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or of any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Under this statute, immunity is waived for "liability for torts" caused by "the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment." [13] Additionally, subsection (5) of the statute limits state liability to $100,000 per claimant and $200,000 per accident.[14]

American Home Assurance Co. v. Nat'l Railroad Passenger Corp.,

In July 2005, the Florida Supreme Court issued its decision in the case of *American Home Assurance Company v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005), in which the court considered whether an indemnification[15] agreement made by a municipal agency, Kissimmee Utility Authority (KUA) with CSX Corporation, Inc. (CSX) was enforceable. The court concluded that the indemnification agreement was binding and enforceable, finding that a municipal agency like KUA has the inherent authority to contract with private parties and enter into an indemnification agreement as part of a contract with a private party and may not invoke sovereign immunity to defeat its obligations under the contract.

In order to improve access to a power plant, the KUA entered into a contract with CSX whereby CSX granted KUA license to build, use, and maintain a private road grade crossing over CSX's railroad tracts. In exchange for the license, KUA agreed to an indemnity provision in the contract under which KUA "assumes all liability for, and releases and agrees to defend, indemnify, protect and save [CSX] harmless" for all loss of or damage to property of CSX or third parties at the crossing or adjacent to it, all loss and damage on account of injury to or death of any person on the crossing, and all claims and

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[9] *Manatee County v. Town of Longboat Key*, 365 So.2d 143, 147 (Fla.1978).
[10] *Rabideau v. State*, 409 So.2d 1045, 1046 (Fla.1982); *Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 424 (Fla.1958).
[11] See ch. 73-313, § 1, Laws of Fla.
[12] *American Home Assurance Company v. National Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1022 (Fla.1979).
[13] § 768.28(1), Fla. Stat. (1997); *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459 (Fla. 2005).
[14] § 768.28(5).
[15] "Indemnification" is defined as "(t)he action of compensating for loss or damage sustained." "Indemnity" is defined as "(t)o reimburse (another) for a loss suffered because of a third party's or one's own act or default. Blacks Law Dictionary, 8th Ed., 2004.

liabilities for such loss and damage. The contractual obligation applied regardless of cause and even if the injury, death, or property damage is caused solely by the negligence of CSX. Further, the contractual obligation extended to "companies and other legal entities that control, are controlled by, are subsidiaries of, or are affiliated with [CSX], and their respective officers, agents and employees."

In finding the indemnification clause binding and enforceable, the court reasoned that, by its plain language, s. 768.28, F.S., applies only to "*actions at law* against the state or any of its agencies or subdivisions *to recover damages in tort.*"[16] The court noted that the indemnification provision at issue in the case was based on a *contract* between KUA and CSX. As such, the court concluded that the statutory provision governing tort recovery actions was not applicable, and that the contract between KUA and CSX was not controlled by the restrictions on the waiver of sovereign immunity found in s. 768.28, F.S.

Further, the court reasoned that KUA possessed the authority of the City of Kissimmee to enter into contracts for municipal services, including the contract with CSX that contained the indemnification clause and which ensured access to the power plant. The court stated that the parties in the case failed to identify any law prohibiting KUA from executing the contract containing the indemnification provision. In fact, the court found that although KUA did not need an express statutory grant of authority to execute the contract in light of its broad home rule powers, s. 163.01, F.S., grants specific authority to KUA to contract with private parties regarding electrical projects.[17]

The court concluded that the contract requiring the KUA to indemnify CSX was not controlled by statutory restrictions on the waiver of sovereign immunity and was binding and enforceable against KUA.

Effect of Proposed Changes

This bill amends the charter of the City of Jacksonville contained in ch. 92-341, L.O.F., to prohibit the City or any independent agency of the City from agreeing to waive sovereign immunity for tortious conduct of the City or of any such independent agency beyond the limitations of the legislative waiver of sovereign immunity established in section 768.28, F.S. The City charter defines "independent agencies" as the Duval County School Board, the Jacksonville Port Authority, the Jacksonville Transportation Authority, the Jacksonville Electric Authority, the Jacksonville Downtown Development Authority, and the Jacksonville Police and Fire Pension Board of Trustees. [18] This provision of the bill appears to be consistent with existing general law regarding legislative waivers of sovereign immunity, the Florida Constitution which requires legislative waiver of sovereign immunity, and case law interpreting the constitutional requirement.

In addition, the bill provides that a contract of the City or any independent agency may not agree to indemnify, defend, or hold harmless another party for the tortious conduct of any party other than the city or the independent agency, respectively. Any contractual provision for an indebtedness or liability contracted for in violation of this provision is void and must be severed from the contract.

Lastly, the bill provides that it is effective upon becoming law, and does not contain explicit expression of a legislative intent to apply the provisions retroactively. It is a well-established rule of construction that, in the absence of clear legislative intent to the contrary, a law is presumed to act prospectively only. [19] The basis for retrospective interpretation must be unequivocal and leave no doubt as the

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[16] § 768.28(1), Fla. Stat. (1997) [emphasis added]; see also *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So.2d 481, 486 (Fla.2001) (concluding that section 768.28 "applies only when the governmental entity is being sued in tort"; thus, limitations of section 768.28 did not apply to restrict award of damages against governmental entity for the erroneous issuance of a temporary injunction).

[17] Section 163.01, F.S., expressly authorizes public agencies to contract with private parties regarding electrical projects.

[18] ch. 92-341, L.O.F. (Art. 18, s. 18.07)

[19] *State Farm Mutual Automobile Ins. Co. v. Laforet,* 658 So.2d 55 (Fla. 1995); *State v. Zukerman-Vernon Corp.*, 354 So.2d 353 (Fla. 1977), *Walker & LaBerge, Inc. v. Halligan*, 344 So.2d 239 (Fla. 1977).

legislative intent.[20] Therefore, the courts may consider the provisions of the bill applicable only to contracts entered into on or after this bill's effective date.

C. SECTION DIRECTORY:

Section 1. Amends the City of Jacksonville charter in ch. 92.341, L.O.F., prohibiting waiver of sovereign immunity and limiting the City's authority to execute certain contractual indemnification agreements.

Section 2. Provides that the bill is effective upon becoming a law.

II. NOTICE/REFERENDUM AND OTHER REQUIREMENTS

A. NOTICE PUBLISHED? Yes [x] No []

IF YES, WHEN? October 26, 2005

WHERE? Daily Record, Jacksonville, Duval County, Florida

B. REFERENDUM(S) REQUIRED? Yes [] No [x]

IF YES, WHEN?

C. LOCAL BILL CERTIFICATION FILED? Yes, attached [x] No []

D. ECONOMIC IMPACT STATEMENT FILED? Yes, attached [x] No []

III. COMMENTS

A. CONSTITUTIONAL ISSUES: Article X, section 13 of the Florida Constitution provides that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Based upon this section, it may be argued that a general bill must be enacted, rather than a local bill, to limit the City's authority to contractually agree to indemnify third parties for the tortuous conduct of any party other than the city or an independent agency of the City. On the other hand, the bill may be characterized not as a law regarding bringing suit against the state but as a law expressly limiting the City's inherent authority to contract.

B. RULE-MAKING AUTHORITY: Rule-making authority is not addressed in this local bill.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.

[20] *Larson v. Independent Life & Acc. Ins. Co.*, 158 Fla. 623 (Fla. 1947).

A bill to be entitled

An act relating to the City of Jacksonville, Duval County; amending chapter 92-341, Laws of Florida, as amended; prohibiting the city and independent agencies from waiving sovereign immunity beyond the limitations of the legislative waiver of sovereign immunity established in Florida Statutes; prohibiting the city and independent agencies from indemnifying, defending, or holding harmless contracting parties for the tortious actions of any party other than the city or the independent agency; declaring contractual provisions in violation to be void; providing severability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 18.12 is added to article 18 of chapter 92-341, Laws of Florida, as amended, to read:

ARTICLE 18. MISCELLANEOUS PROVISIONS

Section 18.12. Waiver of sovereign immunity; indemnification.--

(a) No contract of the city or any independent agency may agree to waive sovereign immunity for tortious conduct of the city or of any such independent agency beyond the limitations of the legislative waiver of sovereign immunity established in section 768.28, Florida Statutes.

(b) No contract of the city or any independent agency may agree to indemnify, defend, or hold harmless another party for

the tortious conduct of any party other than the city or the independent agency, respectively.

(c) Any contractual provision for an indebtedness or liability contracted for in violation of this section shall be void and shall be severed from the contract.

Section 2. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES LOCAL BILL STAFF ANALYSIS

BILL #: HB 1151 Collier County
SPONSOR(S): Davis
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Local Government Council	8 Y, 0 N	DiVagno	Hamby
2) Judiciary Committee		Hogge	Hogge
3)			
4)			
5)			

SUMMARY ANALYSIS

Collier County (County) is a non-charter county. The County only has the powers of self-government as provided in general or special law. Special law has given the County's board of county commissioners the power to designate employees of the County's Department of Parks and Recreation as county park enforcement officers (park rangers). Park rangers have the authority to issue citations for violations of County ordinances in county parks, public beaches, beach access areas adjacent to county parks, county operated parking facilities, and public areas immediately adjacent to county parks. Currently, violators who are issued a citation must either pay the fine and waive court appearance, or appear before the county court.

General law gives counties and municipalities the authority to establish administrative boards (or special magistrates) with authority to impose administrative fines and other noncriminal penalties.

This bill requires violators of County ordinances, in areas under the jurisdiction of the County park rangers, who receive citations, to appear before a Code Enforcement Special Master.

This bill would take effect upon becoming law.

According the Economic Impact Statement, Collier County expects an increase of $16,000 in revenue in fiscal year 2007-08.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: This bill grants the Enforcement Code Special Master authority over violations of the Collier County Ordinances under specific circumstances.

B. EFFECT OF PROPOSED CHANGES:

Non-charter Counties

Collier County (County) is a non-charter county. Counties not operating under a county charter only have the powers of self-government provided in general or special law. The board of county commissioners of a non-charter county may enact county ordinances not inconsistent with general or special law. If a county ordinance conflicts with a municipal ordinance, the county ordinance is not effective within the municipality to the extent of the conflict. Section 125.01, F.S., is a general law grant of expansive home rule authority to all Florida counties. All counties have the home rule authority to enact ordinances for any public purpose, absent preemption by the Legislature.

In 1989, Collier County received authority to authorize its Board of County Commissioners (Board) to designate employees of the County's Department of Parks and Recreation as county park enforcement officers (park rangers).[1] Park rangers were given the authority to issue citations within the boundaries of any of the County's parks for violations of County ordinances, or provisions of special acts, and regulating acts within county parks. The form of the citations is prescribed by the Board, but must include the following:

- Date and time of issuance.
- Name and address of the person in violation.
- The date of the violation.
- Description of the violation.
- The County ordinance and section violated.
- Name of citing park ranger.
- A date and time at which the violator shall appear in county court.

If issued a citation, a violator had a mandatory court appearance in the county court.

Chapter 97-347, L.O.F., made amendments to chapter 89-449, L.O.F., in regards to areas in which park rangers could regulate activities. It increased the area from county parks to include public beaches, beach access areas adjacent to county parks, county operated parking facilities, and public areas immediately adjacent to county parks. The amendment also gave violators the option to elect to pay the fine and not appear in court.

Administrative boards are provided for in general law, chapter 162, F.S. Section 162.03, F.S., allows charter or non-charter counties to adopt an alternate code enforcement system by ordinance. The code enforcement boards and/or special magistrates designated by the local governing body are authorized to hold hearing and assess fines against violations of the respective municipal or county codes and ordinances. Neither a member of a code enforcement board or a special magistrate can initiate enforcement proceedings. At the conclusion of a hearing, the enforcement board or special magistrate is required to issue findings of fact, based on evidence of record and conclusions of law, and

[1] Chapter 89-449, L.O.F.

issue an order affording proper relief. An aggrieved party may appeal a final administrative order of an enforcement board to the circuit court.[2]

Collier County has created a Code Enforcement Board (Enforcement Board) to provide an administrative alternative to judicial hearings. The Enforcement Board is comprised of seven members and two alternates. The Enforcement Board hears evidence from Code Enforcement, the alleged violator, and witnesses. If the Enforcement Board determines the accused committed a violation, the enforcement option used is dependent upon the degree and severity of the violation.[3]

Effect of Bill

This bill changes the forum in which a violator would appear. Instead of electing to appear before a county court, this bill provides for appearance before the Collier County Code Enforcement Special Master. Because this is an administrative proceeding in a non-charter county, the proceedings will have to follow the rule in chapter 162, F.S., and County ordinances, to the extent they are not inconsistent with general law.

C. SECTION DIRECTORY:

Section 1: Section 4 of chapter 89-449, L.O.F., as amended by chapter 97-347, L.O.F., is amended to give judicatory authority to Collier County Code Enforcement Special Master.

Section 2: Provides an effective date of upon becoming law.

II. NOTICE/REFERENDUM AND OTHER REQUIREMENTS

A. NOTICE PUBLISHED? Yes [X] No []

IF YES, WHEN? January 16, 2006

WHERE? *Naples Daily News*, Naples, Florida.

B. REFERENDUM(S) REQUIRED? Yes [] No [X]

IF YES, WHEN?

C. LOCAL BILL CERTIFICATION FILED? Yes, attached [X] No []

D. ECONOMIC IMPACT STATEMENT FILED? Yes, attached [X] No []

The Economic Impact Statement indicates that by moving these issues of minor infractions from the court to a special master, the County expects $16,000 in increased revenue for fiscal year 2007-08. This data is based on past revenue from parking citations.[4]

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[2] Sections 162.06, 162.07, and 162.11, F.S.
[3] http://www.colliergov.net/codeenf/EnforcementOptions.htm
[4] Collier County 2006 Economic Impact Statement.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

Access To Courts

Article I, section 21 of the Florida Constitution provides "The courts shall be open to every person for redress of any injury, and justice shall not be administered without sale, denial, or delay." Where citizens have enjoyed a historical right of access, the Legislature can only eliminate a judicial remedy in two circumstances: Valid Public Purpose Coupled with a Reasonable Alternative and/or Overriding Public Necessity.

The Florida Legislature has chosen to allow counties and municipalities to allow administrative boards to have the authority to impose administrative fines and other non-criminal penalties with the goal of promoting, protecting, and improving the health, safety, and welfare of the citizens of the state. This asserts both a public purpose and reasonable alternative.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

A bill to be entitled

An act relating to Collier County; amending chapter 89-449, Laws of Florida, as amended; providing for persons cited by county park enforcement officers to appear before the Collier County Code Enforcement Special Master instead of in county court; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 4 of chapter 89-449, Laws of Florida, as amended by chapter 97-347, Laws of Florida, is amended to read:

Section 4. Enforcement.--A citation issued by a county park enforcement officer (park ranger) under the provisions of this act shall be in a form prescribed by the board of county commissioners. Such citations shall state the date and time of issuance, name and address of the person in violation, the date of the violation, description of the violation, the Collier County Ordinance and section violated, name of the citing county park enforcement officer (park ranger), and a date and time at which the violator shall appear before the Collier County Code Enforcement Special Master ~~in county court~~. The violator may elect a nonmandatory ~~court~~ appearance and pay the fine as prescribed by county ordinance.

Section 2. This act shall take effect upon becoming a law.